

**PROSECUTION OF CHILD ABUSE IN SOUTH CAROLINA:
A MANUAL FOR SOLICITORS AND INVESTIGATORS**

**Fifth Edition
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A Project of the Children's Law Center
School of Law
University of South Carolina

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Preface

This manual is intended to provide a single source of information on the legal issues arising in the investigation and prosecution of child abuse in South Carolina. In keeping with the manual's limited scope, the manual addresses only information necessary to explain the law or practice in South Carolina. Topics of a general nature are not discussed when the advice of another publication is sufficient. In particular, a manual by a national prosecutors' organization provides detailed advice on all aspects of investigation and prosecution. *See* American Prosecutors Research Institute, *Investigation and Prosecution of Child Abuse* (3d ed. 2004). Professor John E.B. Myers' evidence text presents comprehensive and current information on evidentiary issues. *See* John E.B. Myers, *Myers on Evidence of Interpersonal Violence* (5th ed. 2011). Professor Myers' text is referred to in this manual and is an excellent resource for general law and practice around the United States. Likewise, texts specific to South Carolina, such as the criminal law treatise by Professor William S. McAninch, W. Gaston Faurey, and Lesley M. Coggiola, provide significantly more detail on the criminal law of South Carolina than this manual presents.

The statutes and published cases we have provided in the manual were current as of September 30, 2011. We intend to update this manual periodically but our updates will not keep pace with each new enactment and court decision. Anyone using this manual must read and analyze any cases cited and not rely solely on the summaries provided the manual. Moreover, because the law changes more quickly than this manual will be revised, readers must continue to check for changes in cases and statutes. Space has been left in the margins so readers may add citations and comments to reflect individual experiences and the law as it develops.

The experience and insight of prosecutors within South Carolina and throughout the country has been essential to the production of this manual. Charles A. Phipps, then working with the Children's Law Office, wrote both the original and second editions of this manual. He was ably assisted by Suzanne Mayes, who was then the Child Abuse Specialist with the South Carolina Commission on Prosecution Coordination and who contributed numerous materials and ideas. Likewise, Deborah Herring-Lash, Assistant Solicitor, Ninth Judicial Circuit, provided much important information. We also thank Emily Freeman Guerrero, Katherine Graham, Reid Wildman, Patti Slike, and Aleksandra Chauhan for their research assistance on this and earlier editions of the manual. The review and thoughtful comments from these individuals as well as many others who assisted in the publication of this edition and of the earlier editions of this manual greatly improved the final product.

While every attempt has been made to ensure accuracy, errors are inevitable. Please inform us of errors, large or small, and we will make corrections in subsequent editions of this manual.

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About the Children's Law Center

The Children's Law Center is a resource center for South Carolina professionals who are involved in the investigation and prosecution of child maltreatment or in juvenile justice proceedings. The Children's Law Center provides resources and technical assistance to help professionals enhance their knowledge and skills so that court proceedings result in the best possible outcomes for children. One function of the Children's Law Center is to produce practitioner-oriented publications such as this manual. Children's Law Center staff provides case-specific technical assistance to professionals involved in child maltreatment and juvenile justice proceedings. In addition, Children's Law Center staff sponsors and conducts regular training events. Prominent among these training sessions are: the annual Children's Law Conference; *ChildFirst South Carolina*, a week-long course for training forensic interviews of children; trial preparation courses for child protective services caseworkers who may testify in family court proceedings; training for family court solicitors and public defenders; and statewide training for educators and other professionals on their mandated reporter obligations.

For more information on the publications, training, or assistance available through the Children's Law Center, please go to <http://childlaw.sc.edu>, or call us at 803-777-1646.

The Children's Law Center is a program of the School of Law, University of South Carolina.

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Part One:

Statutory Summaries

The following excerpts provide a quick reference to statutes most relevant to the prosecution of child abuse. Also included are summaries of cases interpreting individual statutes. The full text of these statutes is provided in Appendix Eight.

I. Crimes

A. Sexual Penetration, Sexual Contact and Exposure Offenses

S.C. Code Ann. § 16-3-651 (2003). Criminal sexual conduct; definitions.

Provides the essential definitions applicable to criminal sexual conduct offenses.

Selected cases interpreting S.C. Code Ann. § 16-3-651

State v. Morgan, 574 S.E.2d 203 (S.C. Ct. App. 2002). The court held that the act of cunnilingus is completed “when the cunnilinguist licks or kisses the female genitalia. Penetration of the vagina is NOT necessary or required.” (Emphasis in original).

State v. Johnson, 512 S.E.2d 795 (S.C. 1999). There was sufficient evidence of a sexual battery when the victim testified the defendant touched her and it hurt; this testimony was corroborated by medical evidence. The court found insufficient evidence of a sexual battery upon another victim when her statement indicated the defendant touched her and it felt bad.

State v. Mathis, 340 S.E.2d 538 (S.C. 1986). Testimony of a six-year-old child that defendant touched her with his penis and that it hurt was sufficient evidence to prove penetration for purposes of criminal sexual conduct.

Dep’t Soc. Serv. v. Forrester, 320 S.E.2d 39 (S.C. Ct. App. 1984). For purposes of determining harm under § 63-7-20(4)(b) (formerly § 20-7-490(c)), digital penetration constitutes sexual battery for purposes of criminal sexual conduct with a minor.

S.C. Code Ann. § 16-3-652 (Supp. 2010). Criminal sexual conduct in the first degree.

Defines penetration offenses applicable primarily to adult victims. The state must prove that the actor engages in sexual battery with the victim and: (a) the actor uses aggravated force (physical force or violence); (b) the victim submits to the sexual battery during a forcible confinement, kidnapping, trafficking in persons, robbery, extortion, burglary, housebreaking, or “any other similar offense or act;” or (c) the actor causes the victim, without the victim’s consent, to become mentally or physically helpless through the use of a controlled substance or its analogue, or any intoxicating substance.

Selected cases interpreting S.C. Code Ann. § 16-3-652

State v. Lindsey, 583 S.E.2d 740 (S.C. 2003). There was sufficient evidence of aggravated force when defendant locked his 17-year-old step-daughter in the car with him and forced her to engage in sexual activity. The victim testified he would not get off her and that she kicked and fought him. The court held this was sufficient evidence to create a jury issue as to whether defendant used aggravated force.

State v. Green, 491 S.E.2d 263 (S.C. Ct. App. 1997). In contrast to ABHAN where a conviction may be obtained even if “no real force” is used on the victim, “aggravated force” for first degree CSC requires proof of force.

S.C. Code Ann. § 16-3-653 (2003). Criminal sexual conduct in the second degree.

Applies to sexual penetration offenses committed with the use of aggravated coercion (threat of force or violence). This statute is used most often in the context of adult victims.

S.C. Code Ann. § 16-3-654 (2003). Criminal sexual conduct in the third degree.

A sexual penetration offense in which the defendant: (a) uses force or coercion; or (b) knows or has reason to know the victim is mentally defective, mentally incapacitated or physically helpless and aggravated force or aggravated coercion is not used.

Selected case interpreting S.C. Code Ann. § 16-3-654

State v. Richardson, 595 S.E.2d 858 (S.C. Ct. App. 2004). A defendant’s use of religious authority and threats of financial retaliation to the victim’s family was sufficient intimidation to constitute “force or coercion.”

S.C. Code Ann. § 16-3-655 (Supp. 2010). Criminal sexual conduct with minors.

The Sex Offender Accountability and Protection of Minors Act of 2006 (effective July 1, 2006, and known as Jessie’s Law) changed a number of statutes addressing child sex abuse. The criminal sexual conduct with minors statute is one of the statutes substantially changed by Jessie’s Law, but the statute remains the primary charging statute for penetration offenses against children. Force, coercion (except for an offense under subsection (B)(2) when a person is older but meets the conditions of the exception), and consent are irrelevant. Subsection (A)(1) applies to victims aged 0 – 10 years, and subsection (A)(2) applies to victims under 16 years when a defendant has a prior sex offense. Subsection (B)(1) applies to victims aged 11 – 14 years. Subsection (B)(2) applies to victims aged 14 – 15 years when the person committing the offense is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim with one exception. The exception to Subsection (B)(2) applies when a person who is 18 years old or younger has consensual sex with another person who is at least 14 years old. A person meeting the exception may not be charged with criminal sexual conduct with a minor.

Jessie's Law also increased punishments for offenses under subsections (A)(1) and (2) and provides for the death penalty for conviction under (A)(1) in cases when a defendant has a prior sex offense conviction or adjudication under subsection (A)(1) and when the penetration involved in the current and previous offenses was sexual or anal intercourse or intrusion by an object. With respect to the death penalty provision, solicitors should consider the potential impact of *Kennedy v. Louisiana*, 128 S.Ct. 2641 (2008)(Eighth Amendment prohibits death penalty for child rape).

S.C. Code Ann. § 16-3-656 (2003). CSC: assaults with intent to commit.

Assault with intent to commit any CSC is punishable as if the CSC were committed.

Selected case interpreting S.C. Code Ann. § 16-3-656

State v. Sosbee, 637 S.E.2d 571 (S.C. Ct. App. 2006). Court held assault with intent to commit criminal sexual conduct on a minor is a most serious offense under S.C. Code Ann. § 17-25-45 (Supp. 2005) because that offense is more aptly designated an attempt and the statute clearly designates an attempt of a listed offense as a most serious offense.

State v. Fulp, 423 S.E.2d 149, 150 (S.C. Ct. App. 1992). Evidence may support an assault with intent to commit CSC conviction even without verbal communication or an overt act such as attempted penetration. The defendant's intent may be inferred from the circumstances. In this case, the defendant's actions "support an inference that he threatened to use high and aggravated force upon the victim to accomplish a sexual battery."

S.C. Code Ann. § 16-3-658 (2003). CSC: where victim is spouse.

Defines CSC when the victim is the actor's spouse, but makes this section inapplicable to a marriage of a male under 16 to a female under 14.

S.C. Code Ann. § 16-3-659 (2003). Presumption abolished.

This statute abolishes the common law presumption that a male under the age of 14 is incapable of committing rape. It also provides that a person under 14 who commits a violation of section 16-3-651 through 16-3-659.1 shall be tried as a juvenile.

S.C. Code Ann. § 16-3-755 (Supp. 2010). Sexual battery: persons affiliated with schools and students.

The statute prohibits sexual battery, when aggravated force or aggravated coercion are not used, between a person affiliated with a public or private secondary school, in an official capacity, and a student enrolled in the school. Statute provides different maximum punishments depending upon the age of the student and whether the person affiliated with a school has direct supervisory authority over the student.

S.C. Code Ann. § 16-15-20 (2003). Incest.

The full list of prohibited relations is provided in the statute. See Appendix Eight for the full text of the statute. Most relevant to child abuse prosecutions are the following: (1) a man with his daughter, granddaughter, sister, wife's daughter, wife's grand-daughter, brother's daughter, or sister's daughter; (2) a woman with her son, grandson, brother, husband's son, husband's grandson, brother's son, or sister's son.

Note: The following relationships do not fall within the statutory definition provided above: (a) any act committed by a man upon a boy, or a woman upon a girl, regardless of the kinship; (b) any act committed against a step-sibling; (c) any act committed against a cousin.

S.C. Code Ann. § 16-15-50 (2003). Seduction under promise of marriage.

A male over sixteen who "by means of deception and promise of marriage seduces an unmarried woman in this State" commits this offense.

S.C. Code Ann. § 16-15-120 (2003). Buggery.

Creates penalties for "the abominable crime of buggery, whether with mankind or with beast." Although not defined by the statute or case law, buggery generally refers to bestiality and anal intercourse. It is often used synonymously with sodomy. *See Black's Law Dictionary* 189 (7th ed. 1999). Because buggery is a strict liability offense, only the act need be proven. Proof of coercion, a child's age, or any other factor is unnecessary.

S.C. Code Ann. § 16-15-130 (Supp. 2010). Indecent exposure.

The offense must take place "in a public place, on property of others, or to the view of any person on a street or highway." The statute provides an exception for a woman who breastfeeds her own child in a public place, on property of others, to the view of any person on a street or highway. Indecent exposure is a sex offender registry offense under section 23-3-430(C)(14) if "the court makes a specific finding on the record that based on the circumstances of the case the convicted person should register as a sex offender."

S.C. Code Ann. § 16-15-140 (2003). Lewd acts upon a child under sixteen.

Applies to a person over 14 who "wilfully and lewdly" commits or attempts a "lewd or lascivious act upon or with the body, or its parts, of a child under the age of 16 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child." *Note:* For crimes committed before June 4, 1996, the statute applies to victims under 14 years old.

Selected cases interpreting S.C. Code Ann. § 16-15-140

State v. Hardee, 308 S.E.2d 521 (S.C. 1983). The statute is not vague nor overbroad.

Dep't Soc. Serv. v. Forrester, 320 S.E.2d 39 (S.C. Ct. App. 1984). For purposes of determining “harm” under §63-7-20(4)(b) (formerly § 20-7-490(c)), the court of appeals held that fondling the breasts and vagina of a child constitutes lewd acts.

S.C. Code Ann. § 16-17-490(10) (2003). Contributing to delinquency of a minor.

It is unlawful for a person over 18 to knowingly and willfully encourage, aid or cause or to do any act which shall cause or influence a minor: (10) to so deport himself or herself as to willfully injure or endanger his or her morals or health or the morals or health of others.

Selected cases interpreting S.C. Code Ann. § 16-17-490(10)

State v. Michau, 583 S.E.2d 756 (S.C. 2003). Defendant who offered a 17-year-old marijuana and beer in exchange for sex argued that the language “endanger the morals or health” in the statute is unconstitutionally vague and overbroad. The court rejected this argument and upheld the constitutionality of the statute.

State v. Rodriguez, 302 S.E.2d 666 (S.C. 1983). The court upheld defendant’s conviction involving sexual conduct with a minor based solely on this statute.

S.C. Code Ann. § 44-29-60 (2002). Exposing other to STDs.

It is unlawful for anyone infected with a sexually transmitted disease to knowingly expose another to infection.

S.C. Code Ann. § 44-29-145 (2002). Exposing others to HIV.

It is unlawful for a person who knows he is infected with HIV to knowingly expose another to the virus. The statute specifies various acts of transmission. The offense is a felony.

B. Child Sexual Exploitation Offenses

S.C. Code Ann. § 16-3-810 (2003). Engaging child for sexual performance.

For any person to “employ, authorize or induce a child younger than eighteen years of age to engage in a sexual performance” is second degree CSC punishable under section 16-3-653. A parent or guardian may not consent to a child participating in such behavior.

S.C. Code Ann. § 16-3-820 (2003). Sexual performance by child.

For any person to “produce, direct, or promote” a sexual performance involving a child under the age of eighteen is third degree CSC punishable under section 16-3-654.

S.C. Code Ann. § 16-15-305 (2003). Disseminating obscenity; definitions.

Defines terms relating to obscenity offenses.

S.C. Code Ann. § 16-15-335 (Supp. 2010). Using minor to violate obscenity statutes.

A person 18 or older commits this offense if he knowingly hires, employs, uses, or permits a child to do or assist a child in doing an act that is an offense under Article 3 and the person knew or reasonably should have known the act is obscene.

S.C. Code Ann. § 16-15-342 (Supp. 2010). Criminal solicitation of a minor.

Creates an offense for a person 18 years or older to solicit a person under 18 (or “reasonably believed to be under the age of eighteen”) to engage in sexual activity.

Selected case interpreting S.C. Code Ann. § 16-15-342

State v. Gaines, 667 S.E.2d 728 (S.C. 2008). Court found that chats which occurred prior to effective date of statute were admissible under SCRE 404(b) and were cumulative with chats which occurred after effective date of statute. Court rejected appellant’s entrapment defense and appellant’s argument that statute required an overt act in furtherance of solicitation.

S.C. Code Ann. § 16-15-345 (Supp. 2010). Disseminating obscenity to a minor under 18.

A person 18 or older who disseminates obscenity to a person under 18 commits this offense. The meaning of obscene is found in § 16-15-305 which provides: “(1) to the average person applying contemporary standards, the material depicts or describes in a patently offensive way sexual conduct . . . ; (2) the average person applying contemporary community standards relating to the depiction or description of sexual conduct would find that the material taken as a whole appeals to the prurient interest in sex; (3) to a reasonable person, the material taken as a whole lacks serious literary, artistic, political, or scientific value; and (4) the material as used is not otherwise protected or privileged under the Constitution of the United States or of this State.”

S.C. Code Ann. § 16-15-355 (Supp. 2010). Disseminating obscenity to a minor 12 or under.

A person 18 or older who disseminates obscenity to a person 12 or under commits this offense.

S.C. Code Ann. § 16-15-385 (2003 & Supp. 2010). Disseminating harmful material.

A person commits this offense if, “knowing the character or content of the material,” he provides such material to a minor or allows a minor to peruse material that is harmful to minors. See Appendix Eight for the full text of the statute.

Selected cases interpreting S.C. Code Ann. § 16-3-385

Southeast Booksellers Association v. McMaster, 371 F.Supp.2d 773 (D.S.C. 2005). Court enjoined enforcement of S.C. Code Ann. § 16-15-385 on grounds that statute violated the First Amendment and the Commerce Clause.

S.C. Code Ann. § 16-15-387 (Supp. 2010). Sexually explicit public nudity.

It is unlawful to employ a person under the age of 18 to appear in a public place in a state of sexually explicit nudity.

S.C. Code Ann. § 16-15-395 (2003 & Supp. 2010). First degree exploitation of minor.

Subsection (A): A person commits an offense who, knowing the character or content of the material, he: (1) is involved in the use of a minor in a live performance of sexual activity for the purpose of producing material that contains a visual representation of the activity; (2) permits a minor under his custody or control to engage in sexual activity for the purpose of producing such material; (3) transports or finances the transportation of a minor across the state for the purpose of producing such material; or (4) is involved with recording or developing such material for sale or pecuniary gain. Subsection (B): The trier of fact may infer that a participant in a sexual activity depicted in material as a minor through its title, text, visual representations, or otherwise, is a minor. Subsection (C): Mistake of age is not a defense. Subsection (D)(in part): Sentences imposed pursuant to this section must run consecutively with and commence at the expiration of another sentence being served by the person sentenced.

Selected case interpreting S.C. Code Ann. § 16-15-395

Treece v. State, 616 S.E.2d 424 (S.C. 2005). Sentence for first degree sexual exploitation of a minor was required to run consecutively to sentences imposed for two counts of second degree sexual conduct.

S.C. Code Ann. § 16-15-405 (2003 & Supp. 2010). Second degree exploitation of a minor.

Subsection (A): A person commits an offense who: (1) records, photographs, films, develops, or duplicates material that contains a visual representation of a minor engaged in sexual activity; or (2) distributes, transports, exhibits, receives, sells, purchases, exchanges, or solicits such material. The person committing the offense must know the character or content of the material. Subsection (B): The trier of fact may infer that a participant in a sexual activity depicted in material is a minor through its title, text, visual representations, or otherwise, is a minor. Subsection (C): Mistake of age is not a defense. Subsection (D)(in part): No part of the minimum sentence may be suspended nor is the individual convicted eligible for parole until he has served the minimum sentence.

S.C. Code Ann. § 16-15-410 (Supp. 2010). Third degree exploitation of a minor.

Subsection (A): A person commits an offense who, knowing the character or content of the material, possesses material containing a visual representation of a minor engaged in sexual activity. Subsection (B): The trier of fact may infer that a participant in a sexual activity depicted in material as a minor through its title, text, visual representations, or otherwise, is a minor. Subsection (D): This section does not apply to an employee of a law enforcement agency, including the State Law Enforcement Division, a prosecuting agency, including the South Carolina Attorney General's Office, or the South Carolina Department of Corrections who, while acting within the employee's official capacity in the course of an investigation or criminal proceeding, is in possession of material that contains a visual representation of a minor engaging in sexual activity.

S.C. Code Ann. § 16-15-415 (2003 & Supp. 2010). Promoting prostitution of a minor.

Subsection (A): A person commits this offense who knowingly: (1) entices, forces, encourages, or otherwise facilitates a minor to participate in prostitution; (2) supervises, supports, advises, or promotes prostitution of or by a minor. Subsection (B): Mistake of age is not a defense. Subsection (C)(in part): Sentences imposed pursuant to this section must run consecutively with and must commence at the expiration of another sentence being served by the individual sentenced.

S.C. Code Ann. § 16-15-425 (2003). Participating in prostitution of a minor.

A person commits an offense if the person is not a minor and patronizes a minor prostitute.

C. Physical Abuse Offenses

S.C. Code Ann. § 16-3-95 (2003 & Supp. 2010). Great bodily injury upon a child.

Subsection (A) applies to the actor who inflicts the "great bodily injury" upon a child. Subsection (B) applies to a child's parent, guardian, or other cohabiting adult who knowingly allows another to inflict great bodily injury upon a child. Subsection (C) defines "great bodily injury" as "bodily injury which creates a substantial risk of death or which causes serious or permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."

S.C. Code Ann. § 16-3-910 (2003). Kidnapping.

Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away another person by any means whatsoever without authority of law, except when a minor is seized or taken by his parent, is guilty of a felony.

Selected case interpreting S.C. Code Ann. § 16-3-910

State v. Berntsen, 367 S.E.2d 152 (S.C. 1988). Common law false imprisonment has been incorporated into this statute.

S.C. Code Ann. § 16-3-920 (2003). Conspiracy to kidnap.

It is a felony to agree or conspire to participate in a kidnapping.

S.C. Code Ann. § 16-17-495 (2003 & Supp. 2010). Custodial interference.

Subsection (A) makes it a crime for a person to take and conceal a child under 16 to avoid a custody order or custody proceeding. Subsection (B) makes the crime a felony. Subsection (C) lowers the offense to a misdemeanor if a person who violates subsection (A) returns the child within three days of the violation. Subsection (D) increases the penalty if physical force or threat of physical force is used.

S.C. Code Ann. § 16-17-510 (2003). Enticing a child from school.

It is unlawful to entice a child from school or to provide transportation in enticing a child from school. First and second offenses are tried in magistrate's court; third and subsequent offenses are tried in general sessions.

S.C. Code Ann. § 63-5-70 (2010). Unlawful conduct towards a child.

The offense applies only to a defendant who has charge or custody of a child, who is the parent or guardian of a child, or who is responsible for the care and support of a child. It is an offense for such a person to: (1) place the child at unreasonable risk of harm affecting the child's life, physical or mental health or safety; (2) do or cause to be done unlawfully or maliciously any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered; or (3) willfully abandon the child.

Selected cases interpreting S.C. Code Ann. 63-5-70 (formerly S.C. Code Ann. § 20-7-50)

Whitner v. State, 492 S.E.2d 777 (S.C. 1997). The court held a "child" includes a viable fetus. Thus, unlawful conduct can be committed against a viable fetus.

State v. Fowler, 470 S.E.2d 393 (S.C. Ct. App. 1996). The state failed to prove an unwed biological father who injured his infant child had "legal custody" for purposes of this offense.

S.C. Code Ann. § 63-5-80 (2008). Cruelty to children.

It is a misdemeanor to cruelly ill-treat, deprive of necessary sustenance or shelter, or inflict unnecessary pain or suffering on a child. The offense applies regardless of whether the actor is a parent or has charge or custody of the child.

Abolishment of Common Law Offenses (ABIK, ABHAN, Simple Assault and Battery, Aggravated Assault, and Simple Assault)

The Omnibus Crime Reduction and Sentencing Reform Act abolished, effective June 2, 2010, the following common law offenses: assault and battery with intent to kill, assault and battery of a high and aggravated nature, simple assault and battery, assault of a high and aggravated nature, aggravated assault, and simple assault. The act also repealed the following 1976 Code Sections: 16-3-612, 16-3-620, 16-3-630 and 16-3-635.

The act provides that wherever the 1976 Code of Laws refers to the common law offense of assault and battery of a high and aggravated nature, it means assault and battery with intent to kill as contained in repealed Section 16-3-620, and, except for references in Section 16-1-60 and Section 17-25-45, wherever the 1976 Code references assault and battery with intent to kill, it means attempted murder as defined in Section 16-3-29.

The act added new Code sections as follows:

S.C. Code Ann. § 16-3-600(B)(1)(Supp. 2010). Assault and battery of a high and aggravated nature.

A person commits this offense if the person unlawfully injures another person and the great bodily injury results or the act is accomplished by a means likely to produce death or great bodily injury.

Assault and battery of a high and aggravated nature is a lesser included offense of attempted murder as defined in Section 16-3-29.

S.C. Code Ann. § 16-3-600(C)(1)(Supp. 2010). Assault and battery in the first degree.

A person commits this offense if the person unlawfully injures another person and the act: involves nonconsensual touching of the private parts of a person, either under or above the clothing, with lewd and lascivious intent; or occurred during the commission of a robbery, burglary, kidnapping, or theft.

A person also commits this offense if the person offers or attempts to injure another person with the present ability to do so and the act: is accomplished by means likely to produce death or great bodily injury; or occurred during the commission of a robbery, burglary, kidnapping, or theft.

Assault and battery in the first degree is a lesser included offense of assault and battery of a high and aggravated nature as defined in subsection (B)(1) and of attempted murder as defined in Section 16-3-29.

S.C. Ann. § 16-3-600(D)(1)(Supp. 2010). Assault and battery in the second degree.

A person commits this offense if the person unlawfully injures another person or offers or attempts to injure another person with the present ability to do so and: a moderate bodily injury to another person results or moderate bodily injury to another could have resulted; or the act involves nonconsensual touching of the private parts of a person, either above or below the clothing.

Assault and battery in the second degree is a lesser included offense of assault and battery in the first degree as defined in subsection (C) (1), of assault and battery of a high and aggravated nature as defined in subsection (B)(1), and of attempted murder as defined in Section 16-3-29.

S.C. Code Ann. § 16-3-600(E)(1)(Supp. 2010). Assault and battery in the third degree

A person commits this offense if the person unlawfully injures another person or offers or attempts to injure another person with the present ability to do so.

Assault and battery in the third degree is a lesser included offense of assault and battery in the first and second degrees as defined in subsections (C) (1) and (D)(1) respectively, of assault and battery of a high and aggravated nature as defined in subsection (B)(1), and of attempted murder as defined in Section 16-2-29.

S.C. Code § 16-3-610 (Supp. 2010). Assault with concealed weapon.

The statute was amended to include attempted murder as defined in Section 16-3-29 and the assaults defined in Section 16-3-600 as offenses subject to enhanced punishment when committed with a deadly weapon carried or concealed upon the person of the defendant.

NOTE: While the common law crimes of simple assault, aggravated assault, assault and battery of a high and aggravated nature (ABHAN), and assault and battery with intent to kill (ABIK) were abolished, investigators and prosecutors may be dealing with the abolished offenses for some time after the effective date of the Omnibus Crime Reduction and Sentencing Reform Act. For that reason, the following notes continue to be included in this manual.

ABIK is “an unlawful act of violent nature to the person of another with malice aforethought, either express or implied.” *State v. Hinson*, 172 S.E.2d 548, 550 (S.C. 1970).

Selected cases interpreting ABIK

State v. Fennell, 531 S.E.2d 512, 518 (S.C. 2000). The court held that “the doctrine of transferred intent may be used to convict a defendant of ABIK when the defendant kills the intended victim and also injures an unintended victim.”

State v. Foust, 479 S.E.2d 50 (S.C. 1996). (1) In distinguishing ABIK from ABHAN, the jury is instructed that “if the offense would have been murder had the victim died as a result of the assault and battery, then the appropriate offense is [assault and battery with intent to kill] rather than ABHAN.” (2) A specific intent to kill need not be proven: “We hold that it is sufficient if there is shown some general intent, such as that heretofore applied in cases of murder in this State.”

Common law assault with intent to kill (AWIK).

AWIK differs from ABIK in that there is no touching of the victim in AWIK. Assault with intent to kill is a misdemeanor with a maximum punishment of 10 years. *State v. Mims*, 335 S.E.2d 237 (S.C. 1985).

Common law assault and battery of a high and aggravated nature (ABHAN).

“Assault and battery of a ‘high and aggravated nature’ is an unlawful act of violent injury to the person of another, accompanied by circumstances of aggravation, such as the use of a deadly weapon, the infliction of serious bodily injury, the intent to commit a felony, the great disparity between the ages and physical conditions of the parties, a difference in sexes, *indecent liberties, or familiarities with a female*, the purposeful infliction of shame and disgrace, resistance of lawful authority, and others.” *State v. Jones*, 130 S.E. 747, 751 (S.C. 1925) (emphasis added), *overruled on other grounds by State v. Foust*, 479 S.E.2d 50 (S.C. 1996) (overruling the *Jones* definition of assault and battery with intent to kill). *Note*: A sexual ABHAN offense does not require proof of physical injury to the victim. For examples, see William S. McAninch, W. Gaston Fahey, and Lesley M. Coggiola, *The Criminal Law of South Carolina* 218-19 (5th ed. 2007).

State v. Geiger, 635 S.E.2d 669 (S.C. Ct. App. 2006). Appellant convicted of assault with intent to commit criminal sexual conduct and court rejected his argument that he was entitled to a jury charge on ABHAN.

Common law assault.

Type One: “An ‘assault’ is an unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another.” *State v. Jones*, 130 S.E. 747, 751 (S.C. 1925). Type Two: “[I]ntentionally placing another in apprehension of battery regardless of an actual intent to inflict the battery.” William S. McAninch, W. Gaston Fairey, and Lesley M. Coggiola, *The Criminal Law of South Carolina* 209 - 10 (5th ed. 2007) (discussing paucity of case law and citing two 19th Century cases that seem to refer to such an offense).

Common law battery.

“A ‘battery’ is the successful accomplishment of [an assault].” *State v. Jones*, 130 S.E. 747, 751 (S.C. 1925).

Common law simple assault and battery.

“[An] unlawful act of violent injury to the person of another, unaccompanied by any circumstances of aggravation.” *State v. Jones*, 130 S.E. 747, 751 (S.C. 1925).

D. Homicide Offenses

S.C. Code Ann. § 16-3-10 (2003). Murder.

“Murder” is the killing of any person with malice aforethought, either express or implied.

Feticide. “[A]n action for homicide may be maintained in the future when the state can prove beyond a reasonable doubt the fetus involved was viable, i.e., able to live separate and apart from its mother without the aid of artificial support.” *State v. Horne*, 319 S.E.2d 703, 704 (S.C. 1984).

S.C. Code Ann. § 16-3-20 (2003 & Supp. 2010). Punishment for murder: separate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law and the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(a) Statutory aggravating circumstances:

(12) The murder was committed by a person deemed a sexually violent predator pursuant to the provisions of Chapter 48, Title 44, or a person deemed a sexually violent predator who is released pursuant to Section 44-48-120.

Selected cases interpreting S.C. Code Ann. § 16-3-20

State v. Morgan, 626 S.E.2d 888 (S.C. 2006). Court construed S.C. Code Ann. § 16-3-20(A) to allow trial court on remand to receive evidence on the issue of whether appellant is entitled to receive a sentence less than life imprisonment and to decide a sentence that ranges from mandatory minimum of thirty years to life.

S.C. Code Ann. 16-3-29 (Supp. 2010). Attempted murder.

A person, who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied commits the offense of attempted murder. A person who violates this section is guilty of a felony, and upon conviction, must be imprisoned for not more than thirty years. A sentence imposed pursuant to this section may not be suspended nor may probation be granted.

S.C. Code Ann. § 16-3-50 (2003). Manslaughter.

The unlawful killing of another without malice, express or implied.

S.C. Code Ann. § 16-3-60 (2003). Involuntary manslaughter.

Criminal negligence is defined as reckless disregard of the safety of others.

S.C. Code Ann. § 16-3-85 (2003). Homicide by child abuse.

Subsection (A)(1) defines the offense as causing the death of a child under the age of 11 “while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life.” Subsection (A)(2) creates an offense if a person “knowingly aids and abets another person to commit child abuse or neglect” and the abuse or neglect results in the death of the child who is under the age of 11.

Bailey v. State, 709 S.E.2d 671 (S.C. 2011). In this post conviction relief case, the court held that defendant's trial counsel was deficient in failing to object to supplemental jury instructions as the judge perpetuated the jury's confusion that that they could convict defendant of homicide by child abuse based on an unindicted allegation of neglect.

State v. Smith, 705 S.E.2d 491 (S.C. Ct. App. 2011). Court held defendant properly convicted of aiding and abetting homicide by child abuse. Defendant was charged as a principal but trial court allowed State to proceed on aiding and abetting child abuse. Court of appeals found that indictment charging defendant with homicide by child abuse as a principal put defendant on notice that the State may request to proceed on aiding and abetting as well.

State v. Martucci, 669 S.E.2d 598 (S.C. Ct. App. 2008). Court held autopsy photographs and evidence of other injuries were admissible to show child was abused, abuse caused death and that abuse manifested an extreme indifference to human life.

McKnight v. State, 661 S.E.2d 354 (S.C. 2008). Court held defendant was not entitled to a jury instruction on involuntary manslaughter as a lesser included offense of homicide by child abuse. "First ... only the 'unlawful activity' definition of involuntary manslaughter could potentially apply in the arena of child abuse because child abuse is an unlawful act. However, child abuse could never be defined as an unlawful activity "not tending to cause death or great bodily harm" and for this reason, the elements of involuntary manslaughter will never be included in the greater offense of homicide by child abuse." Court also rejected defendant's claim that sentence disparity between criminal abortion statute, § 44-41-80(B), and homicide by child abuse statute violated Equal Protection Clause of Constitution.

State v. McKnight, 576 S.E.2d 168 (S.C. 2003), *denial of post-conviction relief reversed*, 661 S.E.2d 354 (S.C. 2008). Court of appeals held that the plain language of the statute does not preclude application of the statute to the death of a viable fetus. *But see McKnight v. State*, 661 S.E.2d 354 (S.C. 2008)(South Carolina Supreme Court reversed PCR court's denial of petition for relief; supreme court found petitioner's counsel ineffective for: calling a witness whose testimony undermined the defense and failing to call a witness whose testimony supported the defense; failing to investigate medical evidence contradicting State's expert witnesses on link between cocaine and stillbirth; failing to object to judge's charge on criminal intent required for conviction homicide by child abuse; and failing to introduce the autopsy evidence).

State v. Jarrell, 564 S.E.2d 362 (S.C. Ct. App. 2002). The court held that "extreme indifference to human life" is "a mental state akin to intent characterized by a deliberate act culminating in death." *Id.* at 367. The court of appeals held that defendant's conduct

of leaving her home when she knew her child would be killed “is concrete evidence of her indifference toward [the victim’s] life.” *Id.*

E. Drug Offenses Involving Children

S.C. Code Ann. § 44-53-378 (Supp. 2008). Manufacture of Amphetamine or Methamphetamine in the Presence of a Child.

It is unlawful to unlawfully manufacture amphetamine or methamphetamine in the presence of a minor, to permit a minor to be in an environment where a person is selling or offering for sale amphetamine or methamphetamine or where a person possesses the drug for sale, distribution or manufacture, or to permit a minor to be in an environment where drug paraphernalia or volatile, toxic, or flammable chemicals are stored for the purpose of manufacturing amphetamine or methamphetamine. Punishment for a first offense may include confinement for up to five years and punishment for a second or subsequent offense may include confinement for up to ten years.

II. Sentencing

Table One provides information on the following sentencing and post-conviction issues:

- The felony or misdemeanor classification of the offense. S.C. Code Ann. § 16-1-90 (Supp. 2010).
- The length of sentence.
- Whether a person convicted of the offense is required to register as a sex offender. S.C. Code Ann. § 23-3-430 (2003 & Supp. 2008).
- Whether the offense is a serious or most serious offense. S.C. Code Ann. § 17-25-45 (Supp. 2010).
- Whether a person convicted of the offense is required to serve 85 percent of the sentence. S.C. Code Ann. § 24-13-150 (Supp. 2007).
- Whether the offense is a violent crime. S.C. Code Ann. § 16-1-60 (Supp. 2010).
- Whether the crime is a predicate offense for purposes of subsequent sexually violent predator commitment. S.C. Code Ann. § 44-48-10 - 170 (Supp. 2008).

Table One: Sentencing

Offenses and classification	Duration	Register as sex offender?	Most serious or serious offense?	85% offense?	Violent crime?	Predicate SVP offense?
<i>Sexual abuse offenses</i>						
1 ^o CSC, 16-3-652, A felony	30 years	Yes	Most serious	Yes	Yes	Yes
2 ^o CSC, 16-3-653, C felony	20 years	Yes	Most serious	Yes	Yes	Yes

Offenses and classification	Duration	Register as sex offender?	Most serious or serious offense?	85% offense?	Violent crime?	Predicate SVP offense?
3° CSC, 16-3-654, E felony	10 years	Yes	N/A	No	No	Yes
1° CSC with a minor, 16-3-655(A)(1), A felony	25 years to life*	Yes	Most serious	Yes	Yes	Yes
1° CSC with a minor, 16-3-655(A)(2), A felony	30 years	Yes	Most serious	Yes	Yes	Yes
2° CSC with a minor, 16-3-655(B), C felony	20 years	Yes	Most serious	Yes	Yes	Yes
2° CSC with a minor, 16-3-655(C), C felony	20 years	Yes	Most serious; see 17-25-45(C)	Yes	Yes	Yes
Assault with intent to commit 1° CSC, 16-3-656, A felony	30 years	Yes	Most serious	Yes	Yes	Yes
Assault with intent to commit 2° CSC, 16-3-656, C felony	20 years	Yes	Most serious	Yes	Yes	Yes
Assault with intent to commit 3° CSC, 16-3-656, E felony	10 years	Yes	N/A	No	No	Yes
Incest, 16-15-20, E felony	10 years	Yes	N/A	No	No	Yes
Seduction/promise of marriage, 16-15-50, C misd.	1 year	No	N/A	No	No	No
Buggery, 16-15-120, F felony	5 years	Yes	N/A	No	No	Yes
Indecent exposure, 16-15-130, A misd.	3 years	Yes; see 23-3-430(C)(14)	N/A	No	No	No
<p>* Twenty-five years is mandatory minimum and a person previously convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for 1° CSC with a minor under (A)(1) in which both crimes involved sexual or anal intercourse by a person or intrusion by an object must be punished by death or imprisonment for life. With respect to the death penalty for 1° CSC with a minor under (A)(1), prosecutors should be aware of <i>Kennedy v. Louisiana</i>, 128 S.Ct. 2641 (2008)(Eighth Amendment bars imposing death penalty for child rape).</p>						
Lewd acts, 16-15-140, D felony	15 years	Yes	N/A	No	No	Yes
Contributing, 16-17-490(10), A misd.	3 years	No	N/A	No	No	No

Offenses and classification	Duration	Register as sex offender?	Most serious or serious offense?	85% offense?	Violent crime?	Predicate SVP offense?
<i>Sexual exploitation offenses</i>						
Sexual performance, 16-3-810, C felony	20 years	Yes	Serious	Yes	Yes	Yes
Sexual performance, 16-3-820, E felony	10 years	Yes	N/A	No	No	Yes
Using a minor, 16-15-335, E felony	10 years	Yes	N/A	No	No	Yes
Criminal solicitation, 16-15-342, E felony	10 years	Yes, see 23-3-430	N/A	No	No	Yes, see 44-48-30
Disseminating obscenity, 16-15-345, E felony	10 years	Yes	N/A	No	No	Yes
Disseminating obscenity (under 12), 16-15-355, D felony	15 years	Yes	N/A	No	No	Yes
Disseminating harmful materials, 16-15-385, E felony*	10 years	Yes	N/A	No	No	Yes
Public nudity, 16-15-387, E felony	10 years	Yes	N/A	No	No	Yes
1° sexual exploitation, 16-15-395, C felony	20 years	Yes	N/A	Yes	No	Yes
2° sexual exploitation, 16-15-405, E felony	10 years	Yes	N/A	No	No	Yes
3° sexual exploitation, 16-15-410, E felony	10 years	Yes	N/A	No	No	Yes
Promoting prostitution, 16-15-415, C felony	20 years	Yes	N/A	Yes	No	Yes
Prostitution, 16-15-425(C), F felony	5 years	Yes	N/A	No	No	Yes
<i>Physical abuse offenses</i>						

Offenses and classification	Duration	Register as sex offender?	Most serious or serious offense?	85% offense?	Violent crime?	Predicate SVP offense?
Great bodily injury, 16-3-95(A), C felony	20 years	No	N/A	Yes	Yes	No
Allowing GBI, 16-3-95(B), F felony	5 years	No	N/A	No	Yes	No
ABHAN, 16-3-600(B) C felony	20 years	No	Serious	Yes	Yes	No
1° assault & battery, 16-3-600 (C), E felony	10 years	No	N/A	No	No	No
2 ° assault & battery, 16-3-600(D), A misd.	3 years	No	N/A	No	No	No
3° assault & battery, 16-3-600(E), misd.	30 days	No	N/A	No	No	No
Kidnapping, 16-3-910, A felony	30 years	Yes	Most serious	Yes	Yes	No
Conspiracy to kidnap, 16-3-920, A felony	30 years	No	Most serious	Yes	No	No
Transporting to avoid custody order, 16-17-495(B), F felony	5 years	No	N/A	No	No	No
Transporting to avoid custody, 16-17-495(C), A misd.	3 years	No	N/A	No	No	No
Transporting to avoid custody, 16-17-495(D), E felony	10 years	No	N/A	No	No	No
Enticing child from school, 16-17-510, B misd.	2 years	No	N/A	No	No	No
Contributing to delinquency, 16-17-490, A misd.	3 years	No	N/A	No	No	No
Unlawful conduct toward a child, 20-7-50, E felony	10 years	No	N/A	No	No	No

Offenses and classification	Duration	Register as sex offender?	Most serious or serious offense?	85% offense?	Violent crime?	Predicate SVP offense?
Cruelty, 20-7-70, misd.	30 days	No	N/A	No	No	No
<i>Homicide offenses</i>						
Murder, 16-3-10, felony	30 years; capital	No	Most serious	Yes	Yes	No
Attempted murder, 16-3-29 felony	30 years	No	Most serious	Yes	Yes	No
Manslaughter, 16-3-50, A felony	30 years	No	Most serious	Yes	Yes	No
Involuntary manslaughter, 16-3-60, F felony	5 years	No	N/A	No	No	No
Homicide by child abuse, 16-3-85(A)(1), felony	Life; not less than 20 years	No	Most serious	Yes	Yes	No
Aid or abet homicide by child abuse, 16-3-85(A)(2), C felony	20 yrs; not less than 10 years	No	Most serious	Yes	Yes	No
<i>Sex offender registration offenses</i>						
Failure to register, 23-3-470(B)(1), misd.	30 days	No	N/A	No	No	No
Failure to register, 2d offense, 23-3-470(B)(2), C misd.	1 year	No	N/A	No	No	No
Failure to register, 3d offense, 23-3-470(B)(3), F felony	5 years	No	N/A	No	No	No
False information, 23-3-475(B)(1), misd.	90 days	No	N/A	No	No	No
False information, 2d offense, 23-3-475(B)(2), C misd.	1 year	No	N/A	No	No	No
False information, 3d offense, 23-3-475(B)(3), F felony	5 years	No	N/A	No	No	No

Offenses and classification	Duration	Register as sex offender?	Most serious or serious offense?	85% offense?	Violent crime?	Predicate SVP offense?
Failure to vacate, 1 st offense, 23-3-535(D)(1), misd.	30 days	No	N/A	No	No	No
Failure to vacate, 2d offense, 23-3-535(D)(2), A misd.	3 years	No	N/A	No	No	No
Failure to vacate, 3d offense, 23-3-535(D)(3), F felony	5 years	No	N/A	No	No	No
Removing/tampering monitoring device, 23-3-540(l), F felony	5 years	No	N/A	No	No	No
Revocation of electronic monitoring, 23-3-545, E felony	10 years	No	N/A	No	No	No

*Note: In *Southeast Booksellers Association v. McMaster*, 371 F. Supp. 773 (D.C.S.C. 2005), the court enjoined enforcement of S.C. Code Ann. §16-15-385 as applied to “digital electronic files” under S.C. Code Ann. § 16-15-375(2) that are sent or received via the internet.

III. Miscellaneous Related Laws

A. Hepatitis B and HIV Testing

S.C. Code Ann. § 16-3-740 (2003 & Supp. 2010). Required testing of certain convicted offenders.

Upon the request of a victim who has been exposed to body fluids during the commission of a criminal offense, or upon the request of the legal guardian of a victim who has been exposed to body fluids during the commission of a criminal offense, the solicitor must, within forty eight hours, excluding weekends and legal holidays as defined in Chapter 5, Title 53, after the offender is charged, or within forty eight hours, excluding weekends and legal holidays, as defined in Chapter 5, Title 53, after a petition has been filed against an offender in family court, petition the court to have the offender tested for Hepatitis B and HIV. An offender must not be tested under this section for Hepatitis B and HIV without a court order.

Selected case interpreting S.C. Code Ann. § 16-3-740

State v. Houey, 651 S.E.2d 314 (S.C. 2007). Appellant convicted of criminal sexual conduct with a minor. The victim's guardian requested that appellant be tested for HIV and Hepatitis B pursuant to S.C. Code Ann. §16-3-740(B) and trial court honored victim's request. Appellant argued that the state must first establish probable cause to compel testing and that S.C. Code Ann. §16-3-740(B) is unconstitutionally vague. The court held that this case was a special needs exception to the normal requirement that a search be preceded by probable cause. In a "special needs" case, the need to search must be weighed against the interest of the defendant. The court concluded that the State had a legitimate interest in protecting the public from HIV and hepatitis B because these diseases often do not present visible symptoms. Additionally, the invasion of appellant's privacy was minimal and outweighed by the significant state interest. The court also rejected appellant's argument that statute was unconstitutionally vague because testing was allowed without regard to when an alleged offense was committed.

B. Sex Offender Registration

S.C. Code Ann. § 23-3-400 - 525 (2003 & Supp. 2008). Sex offender registration.

Designated sex offenders must register with the state upon their release from incarceration or after conviction if no term of incarceration is imposed. Penalties are imposed for those who fail to register. The act also provides a mechanism by which the public may be informed of a released offender's address.

Note: See Part Three for a discussion of U.S. Supreme Court cases analyzing the constitutionality of sex offender registration and public notification statutes.

Selected cases interpreting S.C. Code Ann. § 23-3-400

State v. Hicks, 675 S.E.2d 769 (S.C. Ct. App. 2009), *vacated State v. Hicks*, 692 S.E.2d 919 (S.C. 2010). Court of appeals rejected appellant's argument that PPP policy requiring registration as a sex offender violated separation of powers and ex post facto prohibition. Court concluded that PPP's imposition of subsequent probation conditions were merely an enhancement of the first set of standard probation conditions. The court distinguished *State v. Stevens* 646 S.E.2d 870 (S.C. 2007) concluding that appellant's case involved merely an enhancement of the condition originally ordered. Court rejected appellant's ex post facto argument because he could not meet part one of two part test: law applies to events that occurred before its enactment. In this case, the statute in question provided PPP the authority to enhance court-imposed probation conditions and the statute existed nine years before appellant was convicted. Supreme Court vacated court of appeal's opinion as appellant had challenged only one of three grounds on which probation revocation was premised (when trial court rules based on several grounds, an appellate court must affirm unless appellant appeals all grounds upon which ruling is based).

State v. Davis, 649 S.E.2d 178 (S.C. Ct. App. 2007). Trial judge accepted plea to lesser offense of ABHAN and sentenced appellant to six years imprisonment suspended upon the service of two years of probation. The judge did not require registration as a sex offender. At probation revocation hearing, probation was revoked and appellant was placed on the sex offender registry. Court construed S.C Code § 23-4-430(D) as not allowing probation judge to alter appellant's final sentence to require registration as a sex offender.

In re Ronnie A., 585 S.E.2d 311 (S.C. 2003). The court rejected a substantive due process challenge of a juvenile registrant.

Hendrix v. Taylor, 579 S.E.2d 320 (S.C. 2003). The court rejected equal protection and procedural due process challenges.

S.C. Code Ann. § 23-3-465 (Supp. 2008). Prohibition Against Sex Offender Living in Campus Student Housing.

A person required to register as a sex offender is prohibited from living in campus student housing on campus at a public institution of higher learning supported by State funds.

S.C. Code Ann. § 23-3-535(B) (Supp. 2008). Limitation on places of residence of certain sex offenders.

(B) It is unlawful for a sex offender who has been convicted of any of the following offenses to reside within one thousand feet of a school, daycare center, children's recreational facility, park, or public playground:

- (1) criminal sexual conduct with a minor, first degree;
- (2) criminal sexual conduct with a minor, second degree;

- (3) assault with intent to commit criminal sexual conduct with a minor; or
- (4) kidnapping a person under eighteen years of age.

Effective June 16, 2009, S.C. Code Ann. § 23-3-535(E)) provides:

- (E) A local government may not enact an ordinance that:
 - (1) contains penalties that exceed or are less lenient than the penalties contained in this section; or
 - (2) expands or contracts the boundaries of areas in which a sex offender may or may not reside as contained in subsection (B).

S.C. Code Ann. § 23-3-540 (Supp. 2008). Electronic Monitoring, Criminal Sexual Conduct with a Minor.

Persons convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for first degree criminal sexual conduct with a minor under 16-3-655(A)(1) or for lewd acts on a minor under 16-15-140 must be ordered to monitoring with an active electronic monitoring device upon release from incarceration or when placed under the supervision of Department of Probation, Parole and Pardon Services. Other sex offenders may be ordered to active electronic monitoring by the court or agency with jurisdiction.

S.C. Code Ann. § 23-3-545 (Supp. 2008). Effect of conviction of willfully violating term or condition of active electronic monitoring.

Persons convicted of willfully violating a term or condition of active electronic monitoring may have the active electronic monitoring revoked and be sentenced to confinement for up to ten years. A person may be sentenced for successive violations, and the maximum time a person may be required to serve when sentenced for successive violations may not exceed the time the person is required to remain on the sex offender registry.

C. Sexually Violent Predators

S.C. Code Ann. § 44-48-10 - 170 (Supp. 2008). Involuntary civil commitment of sexually violent predators.

The Attorney General may file a petition for the commitment of a sexually violent predator to a secure mental health facility. *Note: See Part Three for a discussion of U.S. Supreme Court cases analyzing the constitutionality of sexually violent predator commitments.*

S.C. Code Ann. § 16-3-20 (C) (Supp. 2010) was amended by the Sex Offender Accountability and Protection of Minors Act of 2006 to add the statutory aggravating circumstance that the murder was committed by a person deemed a sexually violent predator under 44-48-10 - 170 or a person deemed a sexually violent predator or who is released under 44-48-120.

In re Manigo, 697 S.E.2d 629 (S.C. Ct. App. 2010). Appellant argued that trial court erred in denying his motion for summary judgment where appellant argued that the court had no jurisdiction because the offense for which he was currently serving a sentence was not a sexually violent offense. Construing Code sections 44-48-30 – 40, the court upheld the trial court's denial of summary judgment as appellant had a prior conviction for assault with intent to commit sexual conduct (acknowledged by the parties to be a sexually violent crime). The court noted that neither statutory section required a person to be currently serving an active sentence for a sexually violent crime in order to qualify as an SVP.

In re Miller, 685 S.E.2d 619 (S.C. Ct. App. 2009), *aff'd*, 713 S.E.2d 253 (S.C. 2011). Defendant was scheduled to be released from prison on December 1, 2005. The probable cause hearing finding probable cause to believe defendant was a sexually violent predator was held on November 3, 2005. Pursuant to S.C Code § 44-48-90, State had authority to continue to confine defendant for 60 days after probable cause hearing leading up to defendant's SVP trial. Due to not having the required mental health evaluation on defendant, State moved for a continuance on December 29, 2005. On January 13, 2006, trial court heard State's motion, granted continuance, and set trial for January 17, 2006. Upon hearing trial court's ruling, defendant moved to dismiss and defendant's motion was heard on January 17, 2006. Trial court did not rule on defendant's motion on January 17 but denied the motion on July 24, 2006. Defendant's SVP trial began on November 27, 2006, and the jury found defendant was an SVP. In upholding trial court's denial of defendant's motion to dismiss, court of appeals considered the guidelines of *In re Matthews*, 550 S.E.2d 311 (S.C. 2001) and noted that the State was ready to proceed on January 13, 2006, and defendant had not filed a motion to dismiss before that date. Although the supreme court affirmed the court of appeals' decision, it clarified certain procedural aspects of the SVPA. The court held that dismissal without prejudice to the State was the appropriate remedy for the State's failure to timely conduct a civil commitment trial within the time provisions of the SVPA. The court also held that, pending the conduct of the civil trial following grant of an inmate's motion to dismiss, the inmate may be released from custody provided that he has completed his sentence as determined by the Department of Corrections. The court noted that that the State need not begin the SVP proceedings anew as both the multidisciplinary team and the prosecutor's review committee would have made appropriate probable cause determinations necessary to support the State's petition to the circuit court for a probable cause decision.

In re Chandler, 676 S.E.2d 676 (S.C. 2009). Court found the State met its burden of establishing probable cause. Court considered respondent's record of offenses and evidence offered by the prosecution that respondent had not completed his treatment program at SCDC. As to physical violence, the court noted, "In any event, physical violence is not a prerequisite under the Act."

Id. at 680 citing *In re Brown*, 643 S.E.2d 118 (S.C. Ct. App. 2007). Finally, court noted that, once respondent has been evaluated, he will have an opportunity to refute the State's allegations that he meets the definition of an SVP at the trial on the merits.

White v. State, 649 S.E.2d 172 (S.C. Ct. App. 2007). Court construed S.C. Code § 44-58-50 to allow a multidisciplinary team to consider all of a person's records, including "the person's criminal offense record" for both convictions and offenses not resulting in convictions.

In re Brown, 643 S.E.2d 118 (S.C. Ct. App. 2007). Court held that probable cause hearing established a clear pattern of sexually deviant behavior and respondent showed no sign of rehabilitation or remorse. Court found that the prosecution did establish probable cause and the respondent had characteristics of a sexually violent predator.

In re Beaver, 642 S.E.2d 578 (S.C. 2007). Court considered statutory criteria for civil commitment pursuant to S.C. Code Ann. § 44-48-30(1) and found that the legislature deemed it appropriate to consider an attempt to commit a lewd act on someone under sixteen as a violent act. Court also held that the trial court erred by finding that the prosecution had failed to provide sufficient evidence that the respondent suffers from a mental abnormality or personality disorder that may cause more sexually violent behavior.

In re Corley, 577 S.E.2d 451 (S.C. 2003). The prosecution was not required to accept the detainee's stipulation at trial to the prior convictions that must be proved as an element of the SVP commitment.

In re Harvey, 584 S.E.2d 893 (S.C. 2003). The court held that the expert testimony provided sufficient evidence of mental abnormality.

In re Tucker, 578 S.E.2d 719 (S.C. 2003). After an SVP detainee petitioned the court for release from commitment, the court held a hearing to determine if probable cause existed to believe his condition had changed. Court held that the detainee failed to establish probable cause to believe his mental condition had changed.

In re Kennedy, 578 S.E.2d 27 (S.C. Ct. App. 2003). Court held that there was sufficient expert testimony at trial to prove beyond a reasonable doubt that the detainee suffered from a mental abnormality that would make him likely to engage in acts of sexual violence. Court also held that the state adequately proved an inability to control behavior as required by *Kansas v. Crane*, 534 U.S. 407 (2002).

D. Criminal Procedure and Evidence

S.C. Code Ann. § 16-3-657 (2003). Corroboration not required.

The testimony of the victim need not be corroborated in prosecutions under sections 16-3-652 through 16-3-658.

State v. Schumpert, 435 S.E.2d 859 (S.C. 1993). Court upheld the trial court's charge of this statute in CSC with a minor case.

S.C. Code Ann. § 16-3-659 (2003). Presumption of incapacity abolished.

The common law presumption that a male under the age of 14 is incapable of committing rape is abolished.

S.C. Code Ann. § 16-3-659.1 (2003). Rape shield statute.

Evidence of specific instances of a victim's sexual conduct or reputation as to sexual conduct is not admissible in prosecutions under Sections 16-3-615 and 16-3-652 to 656. *Note*: Case law is provided in Part Two.

S.C. Code Ann. § 16-3-660 (2003). Deposition testimony of rape victim or victim of assault with intent to ravish.

This statute allows the court to order the deposition of a rape victim. *Note*: The constitutionality of this statute is questionable. Procedures for alternative modes of testimony have been supplanted by S.C. Code Ann. § 16-3-1550(E).

S.C. Code Ann. § 16-3-750(Supp. 2010). Polygraph exam of victim.

This section allows a law enforcement officer, prosecuting official, or other government official to request that the victim of an alleged criminal sexual offense submit to a polygraph but further provides, "however, the officer or official must not require the victim to submit to a polygraph examination or other truth telling device as a condition for proceeding with the investigation, charging or prosecution of the offense."

S.C. Code Ann. § 16-3-1350 (2003 & Supp. 2010). Medicolegal examinations for victims of child sexual abuse.

This section establishes criteria for medical examinations of sexual assault victims and provides for payment for such exams. Act 59 of June 12, 2009 (to be codified at S.C. Code Ann. § 16-3-1350(A)) amends the section by deleting the requirement for a victim to file an incident report with a law enforcement agency in order to avoid bearing the cost of a routine medicolegal exam following assault on the victim.

S.C. Code Ann. § 16-3-1505 - 1569 (2003 & Supp. 2010)). Victim and witness services.

These provisions articulate the responsibilities of the state toward victims of crime and a victim's right to information and services.

Selected case interpreting S.C. Code Ann. § 16-3-1505

Reed v. Becka, 511 S.E.2d 396 (S.C. Ct. App. 1999). Victim does not have standing to appeal a trial court's order (in this case, the court's acceptance of a plea offer.

S.C. Code Ann. § 16-3-1550(E) (2003). Closed courtroom or taped testimony.

Circuit and family courts must "treat sensitively witnesses who are very young, elderly, handicapped, or who have special needs by using closed or taped sessions when appropriate."

S.C. Code Ann. § 17-23-175 (Supp. 2010). Admissibility of out-of-court statements of a child under the age of twelve.

This Jessie's Law provision allows admission of the out-of court statements of a child under twelve years when the child is a victim or a witness in certain crimes which are tried in general sessions court or in a delinquency proceeding in family court. The child's statement must be given in response to questioning during an investigative interview for the investigation of an offense for which the defendant would be required to register as a sex offender upon conviction. Specific procedural steps must be followed in seeking admission of the child's statement, and the court must find that the circumstances surrounding the statement provide sufficient guaranties of trustworthiness.

Selected cases interpreting S.C. Code Ann. § 17-23-175

State v. Russell, 679 S.E.2d 542 (S.C. Ct. App. 2009). Court rejected appellant's argument that admission of videotaped interview with counselor improperly bolstered child's testimony. Court noted that the legislature in S.C. Code 17-23-175 specifically authorized such evidence and that the following language of SCRE 101 acknowledges the superiority of such statutes:

"Except as otherwise provided by rule or by statute"

State v. Bryant, 675 S.E.2d 816 (S.C. Ct. App. 2009). Court rejected appellant's argument that admission of videos of forensic interviews of child victims was prohibited by savings clause of the statute and by ex post facto prohibition. As to ex post facto issue, court noted that the statute affected a mode of procedure and not substantial personal rights (citing *Thompson v. Missouri*, 171 U.S. 380 (1898)); *see also State v. Stahlnecker*, 690 S.E.2d 565 (S.C. 2010)(court rejected ex post facto challenge to statute).

S.C. Code Ann. § 19-11-30 (Supp. 2008). Communications between husband and wife.

Communications between a husband and wife that otherwise would be confidential must be disclosed if the proceeding "concerns or is based on child abuse or neglect, the death of a child, criminal sexual conduct involving a minor, or the commission or attempt to commit a lewd act upon a minor."

E. Miscellaneous Child Protection Statutes

Coordination of investigations

S.C. Code Ann. § 63-11-310 (2010). Children's Advocacy Centers.

This provision defines Children's Advocacy Centers (CACs) and recognizes them as helpful resources for assisting in the coordination of agencies and services. The statute requires CACs to share information with law enforcement and prosecutors.

S.C. Code Ann. § 63-7-920(C) (2010). Number and place of interviews.

Services should be coordinated to minimize the number of interviews and reduce potential emotional trauma to the child. DSS, law enforcement, or both may interview the child in the child's home, at school, or at other "suitable locations," and the interview may be conducted outside the presence of the parents.

S.C. Code Ann. § 63-7-980 (2010). Cooperation between law enforcement and DSS.

DSS and law enforcement must cooperate and establish procedures for referring cases between the two agencies.

S.C. Code Ann. § 63-7-760 (2010). Interagency protocols.

DSS and law enforcement must develop written protocols to address issues related to emergency protective custody.

F. General Child Protection Statutes

S.C. Code Ann. § 19-1-180 (Supp. 2008). Child hearsay in family court.

Identifies circumstances under which child hearsay is admissible in family court proceedings.

Selected case interpreting S.C. Code Ann. § 19-1-180

South Carolina DSS v. Lisa C., 669 S.E.2d 647 (S.C. Ct. App. 2008). Court found that statement of child to psychologist not licensed at the time child made statement was not admissible under S.C. Code 19-11-180(G) which requires "... a licensed family counselor or therapist." *Lisa C.* is a narrow holding that does not apply to all forensic interviews. First, it does not apply to forensic interviews which may be introduced in criminal prosecutions. Footnote 1 of the court's opinion states: Before we begin our analysis, we emphasize this case involves the interpretation of a very specific statute dealing with the introduction of a child's hearsay statements in the context of a DSS intervention action.

Any conclusions should be strictly ascribed to the applications of this statute and should not be extrapolated with respect to the admission or exclusion of hearsay statements in the criminal context. (emphasis added)

669 S.E.2d at 649, n.1.

The limitations of *Lisa C.* do not apply in a family court case involving the out of court statement of a child under twelve pursuant to S.C. Code § 19-1-180 in circumstances where the provisions of S.C. Code § 19-1-180(G) are not involved. For example, if the parents of the child are not separated or divorced, the section (G) requirements for a licensed family counselor or therapist do not apply. Even if the parties are separated or divorced, the section (G) requirements for a licensed family counselor or family therapist apply only when the alleged perpetrator is one of the parents AND the allegation is made after the parents separated or divorced.

S.C. Code Ann. § 63-7-310 (2010). Reporting child abuse.

Defines who must report child abuse and neglect to DSS and provides immunity for those who report in good faith. A reporter must make a report to law enforcement if the reporter has reason to believe a child is abused or neglected, but the actor is someone other than the child's parent or guardian. Additionally, DSS must inform law enforcement of the identity of the reporter, though further release of the person's identity is limited by statute.

S.C. Code Ann. § 63-7-410 (2010). Penalties for failing to report abuse.

A mandated reporter who fails to report commits a misdemeanor.

S.C. Code Ann. § 63-7-620 (2010). Emergency protective custody.

Defines the authority of a law enforcement officer to take a child into emergency protective custody and provides procedures to be followed by DSS, law enforcement, and the family court after an officer takes a child into emergency protective custody.

S.C. Code Ann. § 63-7-990 (2010). Access to sex offender registry.

Upon request from DSS, law enforcement must provide sex offender registry information to DSS.

S.C. Code Ann. § 63-7-750 (2010). Emergency protective custody by medical professionals.

A physician or hospital may detain a child for up to 24 hours under specified conditions if the physician or designated hospital personnel believe the child has been abused or neglected and that release of the child presents an imminent danger to the child.

S.C. Code Ann. § 63-7-920 (2010). Duties of child protective agency.

Enumerates the duties of DSS in investigating and determining the validity of reports of child abuse.

S.C. Code Ann. § 63-7-950 (2010). Religious exemption.

Prohibits DSS from entering a finding of abuse or neglect against a parent who refuses to provide medical treatment to a child on religious grounds. DSS may petition the court to order medical treatment if necessary to prevent death or permanent harm to a child.

S.C. Code Ann. § 63-7-1990 (2010). Confidentiality of reports.

Restricts access to information on reports and records of DSS child abuse investigations.

S.C. Code Ann. § 63-7-1660 (2010). Removal of a child from custody of parent.

Proscribes the procedures under which the family court may order removal of a child from the custody of parents.

Department of Child Fatalities

S.C. Code Ann. § 63-11-1940 (2010). Department of Child Fatalities.

Establishes a Department of Child Fatalities within SLED to investigate child deaths in the state.

S.C. Code Ann. § 63-11-1950 (2010). Child fatality advisory committee.

This multi-disciplinary committee reviews child death investigations, studies incidence of child fatalities in the state, makes recommendations to the governor and general assembly, and educates professionals and the public.

S.C. Code Ann. § 63-11-1970, -1990 (2010). Access to information.

Addresses subpoena power of the Department of Child Fatalities and confidentiality of the department and the committee records.

Part Two

Investigation, Charging, and Pre-Trial Motions

I. Investigative Concerns

A. Searches and Search Warrants

Child abuse cases occasionally raise issues related to search warrants that are unique to this type of case. Included are the following.

Pre-Arrest Search of a Defendant's Body

A child victim may describe birthmarks, scars or other features of a defendant's body. Before a defendant is arrested, a search of the defendant's person for "nontestimonial identification evidence" — blood, saliva, or hair samples — is governed by *In re Snyder*, 417 S.E.2d 572 (S.C. 1992). The court in *Snyder* held that such searches are within the scope of the search warrant statute, S.C. Code Ann. § 17-13-140 (2003). The court listed the elements a trial court must consider at a probable cause hearing: (1) probable cause to believe the suspect committed the crime; (2) a clear indication that relevant material evidence will be found; (3) the method used to secure the evidence is safe and reliable; and (4) the seriousness of the crime and the importance of the evidence to the investigation. The court must balance the necessity for obtaining the evidence against the constitutional safeguards prohibiting unreasonable searches and seizures. 417 S.E.2d at 574.

Post-Arrest Search of a Defendant's Body

Searches of a defendant's body during post-arrest detention are analyzed under the same basic standards as pre-arrest searches. Therefore, a warrant must be obtained before conducting a search that intrudes the defendant's body unless there are exigent circumstances such as the "imminent destruction of evidence." *Gantt v. State*, 580 S.E.2d 133, 135 (S.C. 2003); *State v. Baccus*, 625 S.E.2d 216 (S.C. 2006)(court order that defendant provide a blood sample issued pursuant to S.C. Code Ann. § 17-13-140 must be based on probable cause supported by oath or affirmation); *State v. Sanders*, 693 S.E.2d 409 (S.C. Ct. App. 2009)(blood sample validly obtained in connection with one crime may be used in a subsequent unrelated case). *See also Schmerber v. California*, 384 U.S. 757 (1966) (withdrawal of blood permitted); *State v. Dupree*, 462 S.E.2d 279 (S.C. 1995) (warrantless search of a defendant's mouth permissible when officers had probable cause to believe the defendant was attempting to destroy evidence); *State v. Gammill*, 585 P.2d 1074 (Kan. Ct. App. 1978) (plucking pubic hair from the roots without a warrant was an unconstitutional seizure). The more intrusive the procedure, the less likely the search will be allowed. *See State v. Allen*, 291 S.E.2d 459 (S.C. 1982) (petition for approval of surgical removal of bullet granted

as to one defendant and denied as to another). Some authority holds that non-intrusive searches conducted while a defendant is in detention do not require a warrant. *See, e.g., State v. Riley*, 226 N.W.2d 907 (Minn. 1975) (no warrant necessary to compel a detained defendant to allow officer to view his penis for identifying marks). However, in the absence of South Carolina authority directly authorizing such warrantless searches, the more prudent course is to obtain a search warrant. *See Gantt v. State*, 580 S.E.2d 133, 135 (S.C. 2003) (stating that a warrant must be obtained to take blood from a defendant in jail). *But see State v. Houey*, 651 S.E.2d 314 (S.C. 2007) (court held trial judge's granting of solicitor's motion for HIV and Hepatitis B testing pursuant to S.C. Code § 16-3-740(B) did not violate appellant's right to protection from unreasonable search or seizure. In so holding, court found that this case met the "special needs" exception to the requirement that a search be based on probable cause. The court also held that the statute was not unconstitutionally vague.)

For a general discussion of these issues, see Wayne R. LaFave, *Search and Seizure* vol. 3, § 5.3(c) (3d ed. 1996) (citing cases approving warrantless searches for fingerprints, dental impressions, swabs of a defendant's penis, pubic hair combings, and other non-intrusive procedures); Michelle Migdal Gee, Annotation, *Propriety of Search Involving Removal of Natural Substance or Foreign Object from Body by Actual or Threatened Force*, 66 A.L.R. Fed. 119 (1984).

Pre-arrest Search of the Body of a Witness Who Is Not a Suspect

In *State v. Register*, 419 S.E.2d 771 (S.C. 1992), State petitioned the circuit court for an order requiring the taking of blood, saliva, pubic hair, and head hair samples from a murder suspect's girlfriend. In assessing the validity of the order, the court held:

[W]here a warrant authorizing a bodily intrusion into a potential witness is sought, the State must initially show that there is probable cause to believe a crime has been committed, and probable cause to believe that it was committed by a particular suspect. Once the court has found the existence of probable cause on both grounds, the State must then show: (1) a clear indication that material evidence relevant to the question of the suspect's guilt will be found; and (2) that the method used to secure this evidence is safe and reliable.

Id. at 773. Because the trial court had not followed these procedures, the court vacated the lower court's order.

Strip Searches of Children at School

The United States Supreme Court in *Safford Unified School District #1 v. Redding*, 129 S.Ct. 2633 (2009) held the search of a thirteen year old which included a search of her underwear violated the Fourth Amendment. In *Safford*, the Court added further analysis to the reasonable suspicion standard it established for searches of students at school established in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). "We do mean, though, to make it clear that the *T.L.O.* concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of

wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts. The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions.” *Redding*, 129 S.Ct. at 2643.

One Party Consent Calls and Other Recording Devices

With older children and adults, a useful investigative tool is the one party consent call. In South Carolina, a telephone call may be recorded with the consent of one party to the call. Similarly, a face-to-face conversation may be recorded with the victim wearing a recording device. *See State v. Andrews*, 479 S.E.2d 808 (S.C. Ct. App. 1996) (reversing in part, on other grounds) (applying 18 U.S.C. § 2510 et seq.). So long as the victim consents, law enforcement officers may record a call placed by the victim to the suspect in which the victim confronts the suspect with his conduct. The investigator should discuss with the victim how to start the conversation and prepare the victim for what to expect. In addition, care must be taken to ensure the physical and emotional well-being of the victim.

A prosecutor who is involved with a one party consent call should be aware of ethical rules affecting the prosecutor’s involvement. It is unethical for an attorney — acting in the person’s capacity as an attorney — to record conversations without the consent of all parties to the conversation. *See In re Warner*, 335 S.E.2d 90 (S.C. 1985). In the context of a criminal investigation, however, an attorney may surreptitiously record a conversation “when the recording is made with the prior consent of, or at the request of, an appropriate law enforcement agency in the course of a legitimate criminal investigation.” *In re Attorney General’s Petition*, 417 S.E.2d 526, 527 (S.C. 1992).

Medical Examiner/Coroner Warrants

When a child’s home is not the scene of the child’s death, coroners and medical examiners have statutory authority to seek a warrant to search the home or premises last inhabited by the child. S.C. Code Ann. § 17-5-550 (2003). There must be probable cause to believe that “events in the home or premises may have contributed to the death of the child.” *Id.*

Patriot Act

State v. Odom, 676 S.E.2d 124 (S.C. 2009). Prosecution appealed trial court’s rulings concerning validity of criminal discovery order issued under the federal Patriot Act (sections in dispute included 18 U.S.C. § 2703(d) and 3127(2)(B)(2006)). Court reversed trial court and found circuit court was court of competent jurisdiction under Patriot Act to issue orders of disclosure. Court further held that Patriot Act provisions were not prohibited by S.C. Code Ann. §17-29-20(A). Court held trial court erred in suppressing evidence of chats because of law enforcement this own computer off duty rather than ICAC computer while on duty). Court held violation of MOU goes to weight of evidence and not to admissibility.

In *State v. Wright*, 706 S.E.2d 324 (S.C. 2011), the supreme court discarded the inadvertence requirement of the plain view doctrine and held that two elements satisfy the plain view exception: the initial intrusion which afforded the authorities the plain view was lawful; and the incriminating nature of the evidence was immediately apparent to the seizing authorities. In so deciding, the court noted that it was aligning itself with the majority of states and with the United States Supreme Court in *Horton v. California*, 496 U.S. 128 (1990).

B. *Miranda* Warnings by DSS Employees

The law does not require DSS employees to give *Miranda* warnings to suspects when conducting interviews after the suspect has been arrested on a criminal charge. In *State v. Sprouse*, 478 S.E.2d 871 (S.C. Ct. App. 1996), the defendant, after his arrest and release on bond, voluntarily met with a DSS case manager and made incriminating statements during the conversation. First, the court held that the defendant was not in custody: “Davis [the DSS worker] did not wear a uniform or carry a gun, and at no time did Davis tell Sprouse that he was under arrest. Davis was not a law enforcement officer, and the confession was not the product of a coercive, police-dominated interrogation.” *Id.* at 876. Second, the court held that the DSS worker was not acting as an agent of law enforcement at the time the defendant made the statement. Therefore, the court held that the defendant was not subject to a custodial interrogation and *Miranda* did not apply.

Of course, under different circumstances, a court might find a DSS worker to be an agent of law enforcement and questioning might be deemed custodial. It is important for solicitors to review facts of an individual case in light of case law interpreting *Miranda*. However, as noted here, no rule of law categorically requires all DSS interviews of a suspect to be preceded by *Miranda* warnings. See also *State v. Stahlnecker*, 690 S.E. 2d 565 (S.C. 2010) (court rejected appellant’s argument that trial court erred in admitting his statements to the child victim’s guardian ad litem in violation of appellant’s Sixth Amendment right to counsel; court rejected appellant’s argument that the guardian ad litem was a state actor because she had been appointed by the court as victim’s guardian ad litem).

B.1. Interrogation by Law Enforcement Officers

Law enforcement officers are required to give *Miranda* warnings prior to interrogating a suspect in custody. In *State v. Navy*, 635 S.E.2d 549 (S.C. Ct. App. 2006) *aff’d in part, rev’d in part*, 688 S.E.2d 838 (S.C. 2010), defendant was convicted of homicide by child abuse. On the day of the child’s funeral, police officers asked defendant to accompany them to the police station for questioning. Defendant was not arrested, but the officers informed him that questioning could not be delayed. Prior to being given *Miranda* warnings, defendant made a verbal statement which was typed and signed by defendant. The

officers then informed defendant of certain injuries to the child and of the child's cause of death. Defendant made another verbal statement (inculpatory), and the officers thereafter advised him of his *Miranda* rights. Defendant waived his rights, continued to talk to the officers, and provided two more written statements. While the court of appeals found that defendant was in custody at the time he gave the first inculpatory verbal statement, the supreme court found that defendant was not in custody at the time he gave the first verbal inculpatory statement. The supreme court reversed the court of appeals' finding that the first verbal inculpatory statement should have been suppressed. In considering the admissibility of the two written statements following the first inculpatory verbal statement, both the court of appeals and the supreme court applied *Missouri v. Seibert*, 542 U.S. 600 (2004)(court held unconstitutional question-first technique whereby police officers intentionally question a suspect until inculpatory information is given and then provide *Miranda* warnings). Based on *Seibert*, the supreme court affirmed the court of appeals' holding that the two written statements should not have been admitted.

The United States Supreme Court in *J.D.B. v. North Carolina*, 131 S.Ct. 2394 (2011), the Court held that, so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test (the custody analysis seeks to determine whether a suspect is in custody of the purposes of *Miranda v. Arizona*).

In *State v. Boswell*, 707 S.E.2d 265 (S.C. 2011), the court reversed appellant's conviction for first degree burglary and remanded the case. Appellant was arrested in Calhoun County by law enforcement officers employed by Lexington County. The sheriff's departments of both counties were involved in the case and were operating under a multi-jurisdictional agreement. The agreement had not been properly approved by the Lexington County Council and did not address situations such as those under which the officers operated in this case. The court found defendant's arrest unlawful as the Lexington County law enforcement officers were operating outside their territorial jurisdiction and defendant's confessions obtained after the unlawful arrest were not admissible.

The South Carolina Court of Appeals in *In re Tracy B.*, 704 S.E.2d 71 (S.C. Ct. App. 2010) rejected appellant's arguments that his statements to police were involuntary and that police had violated his right to remain silent by interrogating him following his invocation of the right to counsel. Appellant, a juvenile, was adjudicated delinquent for murder, unlawful possession of a handgun and unlawful possession of a handgun by a minor. Appellant was picked up by the police at football practice and was taken to the police station for questioning. Appellant initially requested a lawyer and the police had ceased interrogating him at that point. Appellant's mother was subsequently brought to the police station and she talked to appellant for five to ten minutes. When appellant's mother left the interview room, she informed the police watch commander that "[appellant] wanted to talk to y'all." Police thereafter continued interrogating appellant who confessed his actions in the case. In rejecting appellant's argument

that the police violated his right to remain silent, the court found that appellant reinitiated communication with the police (through appellant's mother's communication with the police and appellant's talking to the police thereafter).

In *State v. Dye*, 681 S.E.2d 23 (S.C. Ct. App. 2009), appellant was convicted of second degree criminal sexual conduct with a minor (his daughter). The court accepted the trial court's finding that the interrogating law enforcement officer did not threaten to remove his younger daughter if appellant did not confess and rejected appellant's argument that his confession was coerced.

C. Coordinated Investigations

The Children's Code specifies several ways in which investigations must be coordinated between law enforcement and the Department of Social Services, including:

- State agencies are instructed to coordinate their services "to minimize the number of interviews of the child to reduce potential emotional trauma to the child." S.C. Code Ann. § 63-7-920(C) (2008).
- DSS, law enforcement, or both may interview the child in the child's home, at school, or at other "suitable locations," and may conduct the interview outside the presence of the parents. Parents must be notified of the interview as soon as reasonably possible if the notice will not "jeopardize the safety of the child or the course of the investigation." S.C. Code Ann. § 63-7-920(C) (2008).
- DSS must cooperate with law enforcement agencies and "establish procedures necessary to facilitate the referral of child protection cases to the department." S.C. Code Ann. § 63-7-980(A) (2008).
- Law enforcement officers must notify DSS when a report is made directly to the law enforcement agency. S.C. Code Ann. § 63-7-320 (2008).
- DSS must inform law enforcement of the identity of a reporter, but law enforcement may not further release the person's identity. S.C. Code Ann. § 63-7-330(B) (2008).

D. Videotaping

A recurring question for the past several years is whether to videotape the interrogation of a suspect and the forensic interview of a suspected child victim. Several jurisdictions in South Carolina routinely videotape either victim interviews or suspect interrogations and all solicitors should be aware of the ongoing discussion.

Videotaping Suspect Interrogations

The greatest advantage of routine videotaping of a suspect interrogation is the elimination of subsequent factual disputes concerning the demeanor of the defendant, the conduct of law enforcement, and the exact content of the suspect's statement. When the statement is videotaped, the defendant is in a much weaker position to deny his statement was voluntary or to assert that he was misunderstood.

On the other hand, videotaping presents its own set of issues, including the value of the tape to the defense when the defendant does not make incriminating statements; the willingness of a suspect to talk on tape; defense attacks on time defendant spent with police that is not videotaped; gaps or breaks in the interview; and clarity of the sound. Neither South Carolina statutes nor case law mandate videotaping of suspect interrogations or indicate procedures to follow if videotaping is used. Important components of such procedures may include but are not limited to:

- Maintaining a proper chain of custody of the videotape;
- Ensuring the date and time of the interview are clear, preferably a continuous clock that runs on the screen for the duration of the tape;
- Giving *Miranda* warnings on the tape;
- Ensuring that the suspect and all interviewers are visible on the tape.

Videotaping Child Witness Interviews

Prior to July 1, 2006, the effective date of South Carolina Code Ann. § 17-23-175 (Supp. 2010), a common defense strategy in prosecutions of child sexual abuse was to attack the credibility of the child witness either by challenging the child's capacity directly or by calling into question the techniques of professionals who interviewed the child.¹ A persistent issue was whether interviews of child witnesses should be routinely videotaped. Some prosecutors opposed such videotaping while other prosecutors routinely work with agencies that videotape all forensic interviews of children. Section 17-23-175 has eliminated much of the opposition to videotaping. Subsection (A)(2) of the statute provides: "(2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means, except as provided in subsection (F)." Subsection (F) provides that an investigative interview that is visually and auditorily recorded will always be given preference but provides for admission of an unrecorded statement as set forth in the statute (the entire statute set forth in Appendix Eight to this manual).

Even absent the statutory preference for video or audio tapes, proponents of videotaping interviews of children advance several arguments:

- Defendants confronted with strong and specific videotaped statements of a child may be more likely to confess during an interrogation or plead guilty before trial. The sincerity and reality of the child captured on videotape can be more persuasive to a defendant than a law enforcement officer's report of a child's statement.

¹ Professionals in South Carolina have a week-long forensic interviewing course available to them three times every year. The course, *ChildFirst South Carolina*, is taught by the Children's Law Center and the ARC (the children's advocacy center for Richland County). For information on *ChildFirst South Carolina*, call the CLC at 803-777-1646 or visit <http://childlaw.sc.edu>.

- Videotaping can reduce the number of interviews of the child and convince the non-offending parent that the abuse occurred.
- Videotaping can protect interviewers from accusations of coaching or leading the child.
- A child's earlier videotaped statement can be shown to a child in preparation for trial.

If interviews are videotaped, quality equipment and trained operators are prerequisites. Poor quality tapes may create more problems than they solve. A microphone placed near the persons speaking is necessary (rather than relying on the microphone attached to a hand-held videotape recorder). Most importantly, trained and qualified interviewers must conduct the interviews. Poor interviews are amplified on videotape and poor questioning techniques are preserved for use at trial.

Opponents of videotaping of children pose objections including the following:

- Defense attorneys may exaggerate a child's inconsistencies or the effect of an interviewer's questioning technique. Similarly, a defense attorney may take portions of a videotape out of context or argue that any statement not captured on videotape is unreliable.
- A jurisdiction may not have the equipment, facility, or personnel to properly tape.
- Poor questioning techniques and poor interviews are preserved for potential impeachment.

While the decision to videotape an investigative interview of a child victim or witness remains a local decision, the statutory preference for videotaping should weigh heavily in favor of videotaping.

II. Charging

A. Pre-Indictment Delay

A two-part test for determining whether pre-indictment delay violates due process is set forth in *State v. Brazell*, 480 S.E.2d 64, 68-69 (S.C. 1997). First, the defendant must prove that the delay caused substantial actual prejudice to his right to a fair trial. Second, the court must consider the reasons for the State's delay and must balance the justification for the delay against the prejudice to the defendant.

In *State v. Lee*, 653 S.E.2d 259 (S.C. 2007), the court reiterated and applied the two-part inquiry. Lee was indicted in 2001 for first degree criminal sexual conduct and lewd act upon a child based upon charges that he sexually abused his two stepdaughters on separate occasions between 1982 and 1985. In 1988, the Department of Social Services investigated Lee's family when his stepdaughters alleged that he sexually abused them. The solicitor's office was involved in the case through its representation of the Department of Social Services in the family court proceedings, yet no criminal charges were filed at the time. Twelve years later, Lee was indicted, tried, and convicted on CSC charges for the conduct with his stepdaughters in the 1980s.

The State petitioned the court for certiorari to overturn the court of appeals decision which found actual substantial prejudice from the pre-indictment delay. Lee's argument was that the delay between the time

law enforcement knew of the alleged activity and the time of indictment denied him of his Fifth Amendment right to due process of law. The supreme court found ample evidence to support the court of appeals conclusion that respondent suffered actual substantial prejudice and met the first part of the analysis. The court noted that respondent could not gain access to either DJJ records or to records from the family court proceedings. As to the second part of the test, the court rejected the State's argument that Lee must show prosecutorial bad faith and held that a Fifth Amendment claim will stand despite the lack of prosecutorial bad faith. Because the State offered no valid explanation for the delay in indicting Lee and in light of the substantial prejudice to him, the court vacated the convictions.

As noted by the court of appeals in its decision, the approach adopted by the court of appeals (and subsequently the South Carolina Supreme Court) is a minority view adopted only by the Fourth and Ninth Circuits. *State v. Lee*, 602 S.E.2d 113, 116-17 (S.C. Ct. App. 2004). Following the South Carolina Supreme Court's decision in *Lee*, however, a defendant in South Carolina need not show prosecutorial bad faith to establish a pre-indictment delay due process violation. South Carolina's now reaffirmed law presents an obstacle to prosecuting old cases when there was prior governmental involvement in the investigation of a case. By removing the requirement that a defendant demonstrate a bad faith motive for the delay, old cases, especially old child abuse cases with DSS involvement, may be more difficult to prosecute.

B. The Charging Documents

Alleging Time and Place of the Crime

Every indictment must allege the time and place of the crime. *See* S.C. Code Ann. § 17-19-20 (2003). However, it is well established that charging documents in cases of child abuse need not identify the date of the acts with precision. *See State v. Wingo*, 403 S.E.2d 322, 323 (S.C. Ct. App. 1991) ("Where time is not an essential element of the offense, the indictment need not specifically charge the precise time the offense allegedly occurred."); *see also State v. Tumbleston*, 654 S.E.2d 849 (S.C. Ct. App. 2007)(State is not required to denote the precise day, or year, of the accused conduct in an indictment charging criminal sexual conduct). Thus, it is common practice to indict "on or about" a certain date. *See State v. Thompson*, 409 S.E.2d 420, 423 (S.C. Ct. App. 1991) ("on or about" indictment in first degree CSC with a minor case). An "on or about" indictment may be proper even though the dates covered in the indictment were greater than the dates to which the victim testified. *See State v. Schumpert*, 435 S.E.2d 859 (S.C. 1993). In *Schumpert*, the judge gave a jury charge based on the dates set out in the indictment and the defendant presented an alibi to all the dates in the indictment. The court held there was no prejudice to the defendant in that situation. *Id.* at 863.

The timeframe charged in the indictment may span a relatively large period. *See State v. Baker*, 700 S.E.2d 440 (S.C. Ct. App. 2010)(five counts of lewd acts from June 1998 to 2004; time was not material element of offenses and the time alleged occurred prior to the return of the indictment by the grand jury);

State v. Wade, 409 S.E.2d 780 (S.C. 1991) (two year time period for first degree CSC charge); *State v. Wingo*, 403 S.E.2d 322 (S.C. Ct. App. 1991) (approximately two month time period for first degree CSC with a minor and contributing to the delinquency charges).

Other considerations may affect the charging decision. For example, specificity may be necessary to avoid double jeopardy problems when a child is repeatedly abused over a period of years. In such cases, it is often in the prosecutor's interest to charge individual incidents with as much precision as possible, since acquittal of an offense that is charged within a wide time parameter would preclude all future charges if more specific evidence is found subsequently. For a discussion of charging strategy, *see* American Prosecutors Research Institute, *Investigation and Prosecution of Child Abuse* 169-210 (3d ed. 2004).

Alleging the Nature of the Offense

Every indictment must charge the crime substantially in the language of the common law or statute or "so plainly that the nature of the offense charged may be easily understood." S.C. Code Ann. § 17-19-20 (2003). Failure to charge the essential elements of the offense may result in reversal. *See State v. Baker*, 700 S.E.2d 440 (S.C. Ct. App. 2010)(indictments for lewd acts and for CSC with a minor tracked statutory language of crimes and clearly identified elements of the offenses); *but see State v. Marshall*, 257 S.E.2d 740 (S.C. 1979) (charge failed to state essential elements of sexual battery).

In *Bailey v. State*, 709 S.E.2d 671 (S.C. 2011), the supreme court found that the trial court improperly enlarged the indictment by instructing the jury that it could convict defendant of homicide by child abuse if the jury found the defendant abused or neglected the child victim. The indictment alleged an act on the part of the defendant and not an omission so the indictment apprised the defendant that he had to defend only against inflicting physical injuries resulting in the child's death. The indictment did not apprise defendant that the child victim's death was the result of an omission on defendant's part.

Attempted CSC with a Minor

Cases involving defendants charged with attempted CSC with a minor where the attempt includes use of the internet to facilitate the crime may raise an issue of when conduct moves from the preparatory stage to the perpetration stage. In *State v. Reid*, 679 S.E.2d 194 (S.C. Ct. App. 2009), *aff'd* 713 S.E.2d 274 (S.C. 2011), the court addressed that situation in rejecting appellant's contention that the trial court erred in refusing to direct a verdict of acquittal because the prosecution failed to produce sufficient evidence to support the charge of attempted second degree CSC with a minor. Appellant made all the arrangements to meet the person he believed was a child and traveled to the prearranged location to meet the person. The person he believed to be a child was not present when appellant arrived at the prearranged location. Preliminarily, the court noted, "Courts have struggled to determine the point at which conduct moves beyond the preparatory stage to the perpetration stage." *Reid*, 679 S.E.2d at 198. The court then recognized and analyzed a number of decisions from other states. The court concluded that, when

appellant made arrangements for a meeting with the person he believed was a child and traveled to a prearranged location with the purpose of having sex with that person, there was a sufficient act in furtherance of an attempted sex crime. In affirming the court of appeals' decision, the supreme court affirmed that the framework set forth in *State v. Quick*, 19 S.E.2d 101 (S.C. 1942), remains viable for crimes in the emerging area of Internet sex crimes. "We agree with the majority approach and hold that an agreement to meet a fictitious minor at a designated place and time, coupled with traveling to that location, may constitute evidence of an overt act, beyond mere preparation, in furtherance of the crime. We do not, however, create a categorical rule."

C. Amending the Indictment

Amendments to an indictment at trial are proper if: "(1) they do not change the nature of the offense; (2) the charge is a lesser included offense of the crime charged on the indictment; or (3) the defendant waives presentment to the grand jury and pleads guilty." *State v. Warren*, 500 S.E.2d 128 (S.C. Ct. App. 1998), *rev'd on other grounds*, 534 S.E.2d 687 (S.C. 2000). See S.C. Code Ann. § 17-19-100 (2003) (governing amendment of indictments).

An objection to defects appearing on the face of an indictment must be made before the jury is sworn, or the objection is waived. S.C. Code Ann. § 17-19-90 (2003). This rule applies regardless of the nature of the defect. In *State v. Gentry*, 610 S.E.2d 494 (S.C. 2005), the court reversed a long line of cases that held to the contrary. The court stated: "we now conclusively hold that if an indictment is challenged as insufficient or defective, the defendant must raise that issue before the jury is sworn and not afterwards." The *Gentry* decision specifically overrules *State v. Munn*, 357 S.E.2d 461 (S.C. 1987), *State v. Ervin*, 510 S.E.2d 220 (S.C. Ct. App. 1998), and many other cases. In the prosecution of child abuse offenses, the following amendments have been upheld (pre-*Gentry* cases may have to be re-examined in light of *Gentry*):

- *State v. Fonseca*, 681 S.E.2d 1 (S.C. Ct. App. 2009), *aff'd* 711 S.E.2d 906 (S.C. 2011). Following appellant's motion to sever the original indictment, the trial court instructed the prosecution to elect which of two incidents of lewd acts on which to proceed. The prosecution elected to proceed on a later incident and amended the indictment consistent with the election. The court of appeals rejected appellant's argument that the indictment was deficient for lack of notice. In finding the indictment sufficient, the court noted that the language in the amended indictment was the same as in the original indictment except for the year of the alleged act.
- *State v. Means*, 626 S.E.2d 348 (S.C. 2006). Indictment was issued for criminal domestic violence – aggravated. Prior to trial, the solicitor moved to amend the indictment by adding "such an act of violence being of a high and aggravated nature." Considering the case in light of *Gentry*, the supreme court found the indictment was properly amended as it provided defendant notice that he would be tried for CDVHAN. The court provided a method by

which to analyze a pretrial motion to amend an indictment.

- *Wilson v. State*, 488 S.E.2d 322 (S.C. 1997). At plea, the solicitor requested a change in the caption to the indictment to correct a typographical error (it identified the offense as intent to commit CSC with a minor in the second degree when the only applicable offense was intent to commit CSC in the first degree). On PCR, defendant argued his counsel's failure to object to the change amounted to ineffective assistance. The court disagreed, finding that amending the caption of an indictment did not change the charge when the body of the indictment itself alleged the proper offense; counsel was not deficient for failing to object.
- *State v. Warren*, 500 S.E.2d 128 (S.C. Ct. App. 1998), *rev'd on other grounds*, 534 S.E.2d 687 (S.C. 2000). The court upheld amending the offense from first degree to second degree CSC with a minor and to correct the victim's age at the time of the crime. The court held the amendment permissible because it did not change the substantive nature of the offense.

The following amendments have been held improper:

- *State v. Rallo*, 403 S.E.2d 653 (S.C. 1991). When an indictment was orally amended from "on or about" to "on" a specific day and defendant presented an alibi defense based on this indictment, it was reversible error for the judge to charge the jury it could find the offense occurred "on or about" the date.
- *State v. Riddle*, 391 S.E.2d 253 (S.C. 1990). It was improper to allow an amendment from third degree to first degree assault with intent to commit CSC.
- *Hope v. State*, 492 S.E.2d 76 (S.C. 1997). It was error to allow amendment from assault with intent to commit third degree CSC to assault with intent to commit first degree CSC.

D. Consolidating Charges for Trial

Although a defense motion for severance lies within the trial court's discretion, the state supreme court has articulated several factors the court must consider. The charges must: (1) arise out of a single chain of circumstances; (2) be proved by the same evidence; (3) be of the same general nature; and (4) not jeopardize the substantive rights of the defendant. *State v. Harry*, 468 S.E.2d 76 (S.C. Ct. App. 1996). Or, as explained in *State v. Smith*, 470 S.E.2d 364 (S.C. 1996):

Where the offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place, and character, the trial judge has the power, in his discretion, to order the indictments tried together if the defendant's substantive rights would not be prejudiced.

Id. at 365.

The classic case of proper joinder is *State v. Grace*, 564 S.E.2d 331 (S.C. Ct. App. 2002). In *Grace*, the court upheld the conviction of a defendant tried for multiple acts committed against the same victim. The 14-year-old victim lived with her aunt and uncle. On four occasions in the fall of 1997, the uncle engaged in sexual acts with the victim. The court held:

The indictments in this case involved charges of the same general nature. The crimes alleged were all sexual misconduct crimes and were interconnected. All incidents concerned the same parties, Grace and the niece, and took place in the same location, the guest bedroom, within a relatively short time period. The underlying evidence shows a pattern of sexual abuse and was essentially the same for all charges.

Id. at 333. *See also State v. Jones*, 479 S.E.2d 517 (S.C. Ct. App. 1996) (upholding joint trial of man and woman against two minor victims; both victims were taken to the same location and were present in the same motel room on an occasion of abuse).

In numerous other cases, however, appellate courts have deemed joinder improper.

- *State v. Smith*, 470 S.E.2d 364 (S.C. 1996). The court found reversible error in the trial court's refusal to sever a homicide by abuse prosecution from an ABHAN prosecution of the homicide victim's brother. The ABHAN charge was based on multiple beatings of a two and one-half year old over the course of two months (December and January). The homicide charge was based on the killing of the ABHAN victim's one-year-old sister in January. The supreme court found the defendant's rights to be prejudiced by the trial court's failure to sever the cases. The court held the prior acts against the first victim would have been inadmissible in the trial for the acts committed against the second victim. Introduction of the acts in a joint trial prejudiced the defendant. For additional discussion prior bad acts, see Part Three.
- *State v. Pierce*, 485 S.E.2d 913 (S.C. 1997). The court reversed based on improper joinder of multiple acts against the same victim. The court reversed a conviction of homicide by abuse because the lower court allowed hospital employees to testify the victim had previously been treated for a "split lip" and a swollen eye. Even though there was separate testimony that the child suffered numerous injuries and was a battered child, the court held that this evidence was admitted under a *Lyle* common scheme or plan theory and that since there was no evidence the defendant inflicted the prior injuries, admission of the evidence was error. Importantly, the court noted the evidence may have been admissible in the context of battered child syndrome. *Id.* at 914, n.2.

The related issue of severing trials of co-defendants arises occasionally. In *State v. Smith*, 597 S.E.2d 888 (S.C. Ct. App. 2004), the defendant and his girlfriend were jointly tried for the murder of the girlfriend's 20-month-old daughter. The court held that the defendant failed to demonstrate prejudice arising from the joint trial; thus, the trial court properly refused to sever the trials. *See generally State v. Halcomb*, 676 S.E.2d 149 (S.C. Ct. App. 2009)(summarizing South Carolina law on severing trials of co-defendants).

E. Lesser Included Offenses

The test for determining whether an offense is a lesser included offense of an offense charged is straight forward: does the greater of the two offenses include all the elements of the lesser offense? If the lesser offense includes an element not included in the greater offense, then the lesser offense is not included in the greater. *State v. Northcutt*, 641 S.E.2d 873, 877 (S.C. 2007) *citing Hope v. State*, 492 S.E.2d 76 (S.C. 1997).

As a practical matter, lesser included offenses create two distinct problems for prosecutors. First, prosecutors face the possibility of reversible error if a judge fails to instruct a jury on a lesser included offense at trial. Thus, for example, prior to the effective date of the Omnibus Crime Reduction and Sentencing Reform Act of 2010, it was well established that ABHAN was a lesser included offense of all degrees of CSC, and therefore ABHAN must be instructed if requested by the defense. *See, e.g., State v. Mathis*, 340 S.E.2d 538 (S.C. 1986) (error for trial court to fail to instruct on ABHAN in prosecution for first degree CSC with a minor); *State v. White*, 605 S.E.2d 540 (S.C. 2004) (failure to charge ABHAN in first degree CSC case was reversible error).

The only exception to this rule was that a jury instruction was not required if there is no evidence to support the commission of the lesser offense. The rule has been stated that it must “very clearly appear that there is *no evidence whatsoever*” supporting the lesser offense. *State v. Heyward*, 564 S.E.2d 379, 382 (S.C. Ct. App. 2002) (emphasis in original). *State v. Geiger*, 370 S.E.2d 600 (S.C. Ct. App. 2006) (no requirement to instruct ABHAN as a lesser included offense in prosecution for assault to commit criminal sexual conduct when no evidence was presented to show the lesser offense). Therefore, the denial of an ABHAN charge was proper under certain circumstances. For example, in *Moultrie v. State*, 583 S.E.2d 436 (S.C. 2003), the defendant was charged with CSC with a minor for digitally penetrating a six-year-old. He argued that the victim’s injuries were caused by a fall. In this situation, the court held that “respondent was guilty of a sexual battery or no battery at all. In such a case, the defendant was not entitled to a charge of ABHAN as a lesser-included offense of CSCM.” *See also State v Fields*, 589 S.E.2d 792 (S.C. Ct. App. 2003) (ABHAN instruction not required in first degree CSC prosecution when no evidence was presented that defendant was guilty only of the lesser offense); *State v. Foxworth*, 238 S.E.2d 172 (S.C. 1977) (in the context of an adult victim, it was not error for the court to refuse an instruction for simple assault and battery when all the evidence pointed to ABHAN); *State v. Fields*, 442 S.E.2d 181 (S.C. 1994) (holding ABHAN and simple assault and battery not lesser included within murder when the victim dies as a result of the battery); *State v. Rucker*, 459 S.E.2d 858 (S.C. Ct. App. 1995) (defendant not entitled to instruction on simple assault and battery).

The second potential problem with lesser included offenses is the possibility of reversal on PCR if a defendant pleads to or is convicted of an offense that is not a lesser included offense of a charged offense. South Carolina appellate courts have repeatedly announced that trial courts lack subject matter jurisdiction over pleas and convictions that are not properly indicted. *See, e.g., State v. Ellison*, 586 S.E.2d 596, 597 (S.C. Ct. App. 2003) (“it is a rule of universal observance in administering the criminal law that a defendant must be convicted, if at all, of the particular offense charged in the bill of indictment”) (quoting *State v. Cody*, 186 S.E. 165, 167 (S.C. 1936)).

Table Two, on the following page, identifies those offenses that are lesser included within charges commonly filed in cases of child abuse.

Table Two: Lesser Included Offenses (LIOs)

Charged Offense	Lesser Included Offense	Cases
Attempted murder	ABHAN and assault and battery in the first, second and third degrees	<p>Cases involving ABIK which was abolished by the Omnibus Crime Reduction and Sentencing Reform Act of 2010 are included for reference purposes: <i>State v. Jones</i>, 130 S.E. 747 (S.C. 1925); <i>State v. Hilton</i>, 325 S.E.2d 575 (S.C. Ct. App. 1985); <i>but see State v. Foust</i>, 479 S.E.2d 50 (S.C. 1996) (overruling <i>Jones</i> and <i>Hilton</i> to the extent they require proof of specific intent to kill in ABIK prosecution).</p> <p>The Omnibus Crime Reduction and Sentencing Reform Act of 2010 added attempted murder in S.C. Code § 16-3-29 and, in S.C. Code §16-3-600(B) – (D), specifically provided that ABHAN and assault and battery in the first, second and third degrees are lesser included offenses of attempted murder.</p>
ABHAN	Assault and battery in the first, second, and third degrees	Omnibus Crime Reduction and Sentencing Reform Act, S.C. Code §16-3-600(B) – (E)
<p>The following portions of this table are included for reference purposes only.</p> <p>The Omnibus Crime Reduction and Sentencing Reform Act of 2010 substantially changed the law on ABHAN and on assault and battery.</p>		

Charged Offense	Lesser Included Offense	Cases
degrees of CSC	ABHAN	<i>State v. Primus</i> , 564 S.E.2d 103 (S.C. 2002); <i>State v. Mathis</i> , 340 S.E.2d 538 (S.C. 1986); <i>State v. White</i> , 605 S.E.2d 540 (S.C. 2004)
1° CSC with a minor	ABHAN	<i>State v. Pressley</i> , 354 S.E.2d 777 (S.C. 1987); <i>State v. Forbes</i> , 372 S.E.2d 591 (S.C. 1988)
1° assault with intent to commit CSC with a minor	ABHAN	<i>State v. Murphy</i> , 471 S.E.2d 739 (S.C. Ct. App. 1996)
2° assault with intent to commit CSC	ABHAN	<i>State v. Clarkson</i> , 553 S.E.2d 450 (S.C. 2001)
3° assault with intent to commit CSC	ABHAN	<i>State v. Elliott</i> , 552 S.E.2d 727 (S.C. 2001), <i>overruled on other grounds by State v. Gentry</i> , 610 S.E.2d 494 (S.C. 2005)

Table Three summarizes case law prior to the Omnibus Crime Reduction and Sentencing Reform Act identifying those offenses that are not lesser included within a greater offense.

Table Three: Offenses that Are Not Lesser Included Offenses

Charged Offense	Not lesser included Offense	Cases
Murder	ABHAN; simple assault & battery	<i>State v. Fields</i> , 442 S.E.2d 181 (S.C. 1994) Omnibus Crime Reduction and Sentencing Reform Act of 2010 abolished simple assault and battery and defined ABHAN and <i>Fields</i> may not be controlling law for cases following the effective date of the act.
Murder	Homicide by child abuse	<i>State v. Northcutt</i> , 641 S.E.2d 873 (S.C. 2007)

Charged Offense	Not lesser included Offense	Cases
Homicide by child abuse	Involuntary manslaughter	<i>McKnight v. State</i> , 661 S.E.2d 354 (S.C. 2008)
Kidnapping	ABHAN	<i>Phillips v. State</i> , 314 S.E.2d 313 (S.C. 1984); see note above on the Omnibus Crime Reduction and Sentencing Reform Act
CSC with minor	Lewd acts	<i>State v. Norton</i> , 332 S.E.2d 531 (S.C. 1985)
1° assault with intent to commit CSC with a minor	Lewd acts	<i>State v. Brock</i> , 516 S.E.2d 212 (S.C. Ct. App. 1999)
1° CSC with a minor	2° CSC with a minor	<i>Cohen v. State</i> , 582 S.E.2d 403 (S.C. 2003), <i>overruled on other grounds</i> , <i>State v. Gentry</i> , 610 S.E.2d 494 (S.C. 2005); <i>State v. Ellison</i> , 586 S.E.2d 596 (S.C. Ct. App. 2003)
2° CSC	2° CSC w/ minor	<i>State v. Munn</i> , 357 S.E.2d 461 (S.C. 1987), <i>overruled on other grounds</i> <i>State v. Gentry</i> , 610 S.E.2d 494 (S.C. 2005)
2° CSC with a minor	Criminal solicitation of minor	<i>State v. Reid</i> , 679 S.E.2d 194 (S.C. Ct. App. 2009)
Lewd acts	ABHAN; assault and battery	<i>State v. Sprouse</i> , 478 S.E.2d 871 (S.C. Ct. App. 1996); see note above on the Omnibus Crime Reduction and Sentencing Reform Act

F. Charging Independent Acts Separately

On occasion, a defendant may commit two distinct offenses concurrently. In a case of child sexual abuse, there may be evidence of fondling (a lewd act) that preceded penetration (CSC with a minor). Thus, a

single course of conduct could support multiple charges. *See, e.g., Stevenson v. State*, 516 S.E.2d 434 (S.C. 1999) (defendant properly convicted of both ABHAN and resisting arrest); *State v. Easler*, 489 S.E.2d 617 (S.C. 1997) (using a double jeopardy analysis, the court upheld the defendant's convictions for felony DUI causing death, felony DUI causing great bodily injury, ABHAN, reckless homicide, leaving the scene of an accident, and second offense driving under suspension).

In order to avoid placing a defendant twice in jeopardy for the same crime, there must be evidence that the acts supporting the different charges are indeed independent acts. For example, in *State v. Frazier*, 397 S.E.2d 93 (S.C. 1990), the defendant attempted to forcibly rape an adult. There was evidence that defendant separately put a hand around her neck and told her he was going to kill her after he saw an approaching car. He was convicted of both assault with intent to commit first degree CSC and ABHAN. The court upheld both convictions, finding them to be supported by separate evidence. *Id.* at 94. Thus, double jeopardy was not implicated because the defendant was convicted for two distinct acts; he was not being punished twice for the same act. For a more thorough discussion of the constitutional issues arising in such cases, *see State v. Easler*, 489 S.E.2d 617 (S.C. 1997).

G. Corpus Delicti

The doctrine of corpus delicti is intended to “reduc[e] the possibility of punishing a person for a crime which was never in fact committed” by requiring proof of a criminal act and criminal agency whenever a conviction is based on a confession or admission made out of court. Wayne R. LaFare & Austin W. Scott, *Substantive Criminal Law*, vol. 1, § 1.4(b) at 24 (1986). Thus, there must be some evidence independent of a confession to corroborate the occurrence of a crime. *State v. Owens*, 359 S.E.2d 275 (S.C. 1987). However, the standard for corroborating a confession is not high. In *State v. Thomas*, 73 S.E.2d 722 (S.C. 1952), the court used expansive language, indicating:

Where there is any evidence, however slight, on which the jury may justifiably find the existence or the non-existence of material facts in issue, or if the evidence is of such character that different conclusions as to such facts reasonably may be drawn therefore, the issues should be submitted to the jury.

Id. at 723-24 (quoting prior cases). The court likewise has stated: “the corroboration rule is satisfied if the State provides sufficient independent evidence which serves to corroborate the defendant’s extrajudicial statement and, together with such statements, permits a reasonable belief that the crime occurred.” *State v. Osborne*, 516 S.E.2d 201 (S.C. 1999).

So long as any evidence of corpus delicti exists, the trial court must allow the case to proceed to the jury. The prosecution may present evidence in any manner it chooses — including presenting evidence of a confession before presenting corroborating evidence — but if at the end of the prosecution’s case the sole evidence of guilt is a confession, the court must direct a verdict in favor of the defendant. *State v.*

Williams, 468 S.E.2d 656, 658 (S.C. 1996). [Note that the *Osborne* court makes it clear that the corroboration rule applies to partial admissions as well as confessions, overruling any prior cases that suggested otherwise. 516 S.E.2d at 203-04, n.8].

Originally applicable only to homicide cases, South Carolina courts apply the corpus delicti doctrine to other crimes as well. *See State v. Williams*, 468 S.E.2d 656 (S.C. 1996) (arson). In child abuse cases, the doctrine most often arises in the case of child homicide, in which case there must be evidence that: (1) a person was killed; and (2) the death was caused by the criminal agency of another. Although necessarily imprecise, the following standards have been articulated:

- *The criminal act and criminal agency may be proven by circumstantial evidence.* In cases of child homicide, little or no medical evidence may exist to establish the cause of death. Courts in other jurisdictions have upheld convictions for child homicide based on relatively little corroborating evidence. *See State v. Reed*, 676 A.2d 479 (Me. 1996) (sufficient corroboration in suffocation case even though medical examiner labeled the cause of death SIDS); *People v. Biggs*, 509 N.W.2d 803 (Mich. Ct. App. 1993) (sufficient corroboration in suffocation case). *But see State v. Aten*, 927 P.2d 210 (Wash. 1996) (autopsy evidence insufficient corroboration when it could support either death by SIDS or death by suffocation).

Many courts recognize that in the context of child homicide, the prosecution need only present evidence which tends to prove a criminal act; the prosecution is not required to affirmatively disprove any possible accidental explanation for the death. *See State v. Morton*, 638 P.2d 928, 932 (Kan. 1982) (evidence in child homicide case sufficient to support the verdict); *State v. Perdue*, 357 S.E.2d 345 (N.C. 1987) (state not required to expressly preclude accident as the cause of death); *State v. James*, 819 P.2d 781 (Utah 1991) (inability of autopsy to prove cause of death does not preclude finding of criminal act); *State v. Allen*, 839 P.2d 291 (Utah 1992) (evidence of multiple injuries to child sufficient to corroborate confession even though the child likely died from suffocation for which there was no conclusive medical evidence); *State v. Cunningham*, 598 P.2d 756, 773 (Wash. Ct. App. 1979) (rev'd on other grounds) (evidence that child was subjected to physical abuse corroborates confession even if numerous persons could have inflicted the injuries). *But see State v. May*, 689 S.W.2d 732, 736 (Mo. Ct. App. 1985) (manslaughter conviction reversed because prosecution did not exclude a fall as a cause of death of an 11-month-old, nor did the prosecution adequately prove the defendant was the criminal agent).

While no appellate court in South Carolina has directly ruled on these issues in the context of child homicide, existing precedent in other contexts provides support for this view. *See Brown v. State*, 415 S.E.2d 811 (S.C. 1992) (proof of corpus delicti apart from defendant's confession was sufficient even though the precise cause of death could not be determined); *State v. Thomas*, 73 S.E.2d 722 (S.C. 1952) (corroboration found sufficient even though body of adult homicide victim was badly decomposed and the medical examiner could not state with certainty the cause of death). *See United States v. Woods*, 484 F.2d 127 (4th Cir. 1973) (admitting evidence of prior bad acts to support the corpus delicti in the prosecution of a defendant for the death of her foster son when seven other children had died while in her care).

- *The victim's body need not necessarily be recovered.* When a newborn is killed by a caretaker and the body is not recovered, the common law would have precluded prosecution. In South Carolina, however, prosecution is not automatically precluded on this ground. In *State v. Owens*, 359 S.E.2d 275 (S.C. 1987), the victim was a businessman and family man who disappeared without taking care of business or family matters and without taking medication necessary for his health. The court held that an inference could be drawn as to his disappearance based on his “personal habits and relationships.” *Id.* at 278. In the context of child homicide, analogous arguments explaining an immobile infant’s sudden disappearance could be made.
- *There must be evidence that a newborn was born alive.* In a prosecution for the homicide of a newborn, there must be evidence independent of a confession that the child was born alive. If a child is not living when born, the first prong of the corpus delicti test is not satisfied — there has been no “death.” See *State v. Collington*, 192 S.E.2d 856 (S.C. 1972). On the other hand, if a viable fetus is killed in utero, a common law “feticide” offense exists and the killing of the fetus is prosecuted as a homicide. *State v. Horne*, 319 S.E.2d 703 (S.C. 1984). The elements of the offense itself — proof that the fetus would be able to live separate and apart from its mother without artificial support — seem to satisfy the corpus delicti requirement of proof of death of a person.

H. Accomplice Liability

Can two caretakers be charged with the same offense when both were present but little or no evidence exists to indicate which of the caretakers committed the act? What if it is clear that one caretaker committed the abusive acts and the other failed to intervene. Can the one who failed to protect a child be charged? Different theories can be advanced to support charging under each of the scenarios, although South Carolina appellate courts have not ruled directly on these issues.

The omissions of a person who has a legal duty toward another person can constitute a criminal act. Parents have a legal duty to care for their children. See S.C. Code Ann. § 63-5-70 (2010); *Campbell v. Campbell*, 20 S.E.2d 237 (S.C. 1942). Thus, criminal liability may be imposed on parents for omissions that result in injuries to their children. In other words, a parent who fails to stop a battery on his or her child could be charged for the battery. See *State v. Holder*, 676 S.E.2d 690 (S.C. 2009) (court upheld conviction of mother for homicide by child abuse whose live-in boyfriend killed child). See also McAninch, Faurey & Coggiola, at 22 (citing North Carolina law). While many factors will affect whether to charge in an individual case, the legal basis for such a charge should be sound. See e.g., *Lane v. Commonwealth*, 956 S.W.2d 874 (Ky. 1997). For a thorough discussion of the issues in the context of a case involving charges against a live-in boyfriend, see *State v. Miranda*, 878 A.2d 1118 (Conn. 2005). See also American Prosecutors Research Institute, *Investigation and Prosecution of Child Abuse* 195-96 (3d ed. 2004) (discussing factors to consider in determining whether to charge).

It is also important to note that the child homicide statute expressly imposes liability on one who knowingly aids and abets in the commission of child abuse that results in the death of a child under the age of eleven. S.C. Code Ann. § 16-3-85(A)(2) (2003). See *State v. Smith*, 705 S.E.2d 491 (S.C. Ct.

App. 2011)(Court held defendant properly convicted of aiding and abetting homicide by child abuse where defendant was charged as a principal and charging of child abuse as a principal put defendant on notice that the State may request to proceed on aiding and abetting as well).

A parent may be charged with accessory before the fact to criminal sexual conduct with a minor when the parent aids and abets another in the commission of the criminal sexual conduct. *See e.g. State v. Claypoole*, 639 S.E.2d 466 (S.C. Ct. App. 2006)(conviction of mother for accessory before the fact to criminal sexual conduct with a minor upheld where mother knew mother's boyfriend, a registered sex offender, was having sex with her minor daughter but did nothing to stop it).

I. The Sexually Violent Predator Law and Charging Decisions

Prosecutors statewide have felt the effects of the sexually violent predator (SVP) statute on charging and plea negotiation of sex offenses. Prosecutors should keep the following aspects of the SVP statute in mind during charging and plea negotiations.²

- Do not rely exclusively on a sexually violent predator statute to “take care” of the problem of sex offenders. Continue to pursue convictions that reflect the severity of the offense and provide appropriate punishment.
- Be aware of the predicate offenses that constitute a sexually violent offense. S.C. Code Ann. § 44-48-30(2) (Supp. 2008).
- When a defendant has more than one victim, make sure the defendant pleads to more than just one victim. Convictions for multiple offenses or against multiple victims may help establish the offender's status as a sexually violent predator. S.C. Code Ann. § 44-48-30(1)(b) (Supp. 2008).
- The threat of indefinite civil commitment provides defendants with a strong incentive not to accept a plea which would potentially subject them to this statute. Be wary of accepting a plea to a non-included offense solely based on the defendant's desire not to be subject to the law.
- Be careful in accepting an *Alford* plea to an offense subject to the sexually violent predator statute. Because no treatment program will be effective if an offender denies the conduct, pleas — especially those with a recommendation of treatment — should be reserved for sex offenders who are willing to acknowledge their behavior. Note, however, that a “nolo contendere” plea constitutes a “conviction” for purposes of the sexually violent predator statute. S.C. Code Ann. § 44-48-30(6) (Supp. 2008).
- A plea agreement should be structured with the requirement that the offender admit the conduct. Pleas should also specify the treatment requirements and the conditions of probation. If an offender violates terms of probation and is incarcerated, the admission as well as the violation may influence a later SVP petition.

² Many of these suggestions are adapted from Brian K. Holmgren, *Sexually Violent Predator Statutes — Implications for Prosecutors and Their Communities*, The Prosecutor (National District Attorneys Association, Alexandria, VA), May/June 1998, at 20.

- Be prepared for insanity pleas. Defendants may attempt to argue that a prosecutor's opposition to an insanity plea estops the Attorney General from later asserting the defendant has a "mental abnormality or personality disorder" for purposes of the SVP statute. Because the test for insanity is entirely different from the SVP determination, defense arguments on this ground should fail. Moreover, the SVP statute explicitly includes guilty but mentally ill and not guilty by reason of insanity as "convictions" for purposes of the SVP statute when a sexual offense is involved. S.C. Code Ann. § 44-48-30 (Supp. 2008). Nonetheless, because a defendant's mental state is at issue in both, there is potential for defense arguments based on estoppel.

J. The Effect of Family Court Dispositions

A question that arises periodically is whether an outcome adverse to the state in family court is final as to that matter. *See People v. Percifull*, 12 Cal. Rptr.2d 331 (Cal. Ct. App. 1992) (juvenile court determination that the state had not proved dependency did not bar subsequent criminal prosecution). Although the precise issue has not been addressed by South Carolina appellate courts, the court in *Dep't Soc. Serv. v. Strahan*, 426 S.E.2d 331 (S.C. Ct. App. 1992), considered a related issue and the *Strahan* court's decision indicates this argument would not succeed. In *Strahan*, DSS commenced proceedings in family court to protect a child after criminal proceedings had been instituted against the boyfriend of the child's mother. The criminal court defendant argued that the criminal court retained exclusive jurisdiction over the matter, depriving the family court of subject matter jurisdiction. The court rejected this argument:

In short, we hold a criminal indictment does not deprive the family court of jurisdiction over cases involving the same factual situation where the family court is exercising civil jurisdiction as is its responsibility under the Children's Code. These are separate, independent actions with different goals, seeking different relief.

426 S.E.2d at 332.

In addition, the court rejected an argument that the civil proceeding placed defendant in jeopardy twice for the same incident. The court found that the family court matter was "totally independent" of the criminal court charge and that any family court finding would have "no effect" on the criminal action. *Id.* at 332. The broad language of the *Strahan* opinion provides strong support that a family court decision would not be final as to a criminal court proceeding. *See also State v. Warren*, 500 S.E.2d 128 (S.C. Ct. App. 1998), *rev'd on other grounds*, 534 S.E.2d 687 (S.C. 2000) (a contempt finding in family court based on the same conduct resulting in a CSC with a minor conviction does not constitute double jeopardy).

By contrast, a criminal conviction may conclusively prove facts for the purposes of a subsequent family court matter. *See Doe v. Doe*, 551 S.E.2d 257 (S.C. 2001) (holding a defendant in a civil lawsuit is estopped from re-litigating the issue of whether an assault occurred when the defendant has been convicted of CSC and lewd act charges in criminal court). *See also In re Laurali M.*, 670 N.Y.S.2d 160

(N.Y. App. Div. 1998); *In re Princess CC*, 502 N.Y.S.2d 554 (N.Y. App. Div. 1986). *But see, Dep't. Soc. Serv. v. C.K.*, 685 S.E.2d 835 (S.C. Ct. App. 2009)(appellant was convicted of simple assault and battery of her child in criminal court but family court finding that she abused her child, based on the criminal conviction, as defined in S.C. Code § 63-7-20 (2010) was reversed because there was no evidence in the family court as to the relationship between the appellant and the child).

It is not a denial of equal protection or due process for a family court in an intervention action to refuse to hold the intervention action in abeyance pending resolution of related criminal charges. *Dept. of Social Services v. Walter*, 631 S.E.2d 913 (S.C. Ct. App. 2006)(respondent in intervention action was alleged to have sexually abused a sixteen year old and at time of the family court action criminal charges were pending against him for that sexual abuse).

III. Discovery

A. Defense Discovery of Confidential Victim Records

Victims of sexual abuse have a strong desire to maintain the confidentiality of certain records, such as school records, medical records, juvenile adjudications, and information disclosed in counseling sessions. Competing with the victim's desire to maintain privacy is a defendant's desire to examine all records related to the victim, hoping to find information with which to cross-examine the victim. Child abuse prosecutors, while mindful of the defendant's right to discovery provided by rule, statute and constitution, often must work to avoid needless forays into a victim's confidential records.

Health Records (STDs and HIV)

The state Department of Health and Environmental Control is required by law to keep confidential all sexually transmitted disease and HIV records in its possession. Therefore, neither state agencies nor defendants may compel production of such records by subpoena alone; rather, a court order must be obtained. S.C. Code Ann. § 44-29-136 (Supp. 2005). Title 44 requires the following:

- The court must make a finding that the request is valid and that there is a compelling need for the test results. In determining a compelling need, the court must weigh the need for disclosure against both the privacy interest of the test subject and the potential harm to the public interest. S.C. Code Ann. § 44-29-136(A) (Supp. 2005).
- The court shall provide the department and the person who is the subject of the test results with notice and an opportunity to participate in the court hearing. S.C. Code Ann. § 44-29-136(A) (Supp. 2005).
- No court may issue an order solely on the basis of anonymous tips or anonymous information. A person who provides information relied upon by a law enforcement agency or solicitor must sign a sworn affidavit setting forth the facts upon which he basis his or her allegations. This person shall

appear and be subject to examination and cross-examination at the hearing. S.C. Code Ann. § 44-29-136(B) (Supp. 2005).

- Pleadings pertaining to disclosure of test results must substitute a pseudonym for the true name of the subject of the test. Court proceedings must be conducted *in camera* unless the subject of the test requests a hearing in open court. All files regarding the court proceeding must be sealed unless waived by the subject. The court may impose additional appropriate safeguards against the unauthorized disclosure of records. S.C. Code Ann. § 44-29-136(C) (Supp. 2005).

The state can seek records for two primary purposes: (1) prosecutions for exposure of others to HIV under section 44-29-145; or (2) when the test results are material evidence of proof, such as when a victim has a specific STD and the state intends to offer evidence that the defendant has the same disease.

In a prosecution for knowing transmission of HIV, the court held that DHEC must release counseling records that would help prove the defendant knew of his or her HIV status. *In re Dep't of Health & Envtl. Control*, 565 S.E.2d 293 (S.C. 2002). The court also held that the defendant's HIV test results were admissible pursuant to the business records exception of the hearsay rule without establishing a chain of custody. *Id.* at 297.

It is important to note that Title 44 does not prevent a party from obtaining hospital records or lab results (as opposed to DHEC records) by subpoena or with the person's consent.

Other Records

Records maintained by the following sources are governed by statutory confidentiality provisions.

- School records. 20 U.S.C. § 1232g, 34 C.F.R. Part 99.
- Child Fatality Review Board. S.C. Code Ann. § 63-11-1990 (2008).
- Department of Disabilities and Special Needs. S.C. Code Ann. § 44-20-340 (Supp. 2005).
- DSS and Child Abuse Registry. S.C. Code Ann. § 63-7-1990 (2010).
- Department of Mental Health. S.C. Code Ann. § 44-22-100 (Supp. 2005) (records pertaining to a mentally ill or alcohol or drug abuse patient or former patient).
- Guardian ad litem records and reports. S.C. Code Ann. § 63-11-550 (2010).
- Ombudsman. S.C. Code Ann. § 16-3-1640 (2003).
- Sexual assault and mental health counseling. S.C. Code Ann. § 19-11-95 (Supp. 2008) (confidences of patients of mental illness or emotional conditions).
- Physicians. S.C. Code Ann. § 44-115-40 (Supp. 2004) (physicians not to release records without express written consent).

B. Discovery of Privileged Records

Testimonial privileges allow a person to refuse to turn over certain communications. SCRE 501 provides that privileges are governed by the common law, and South Carolina common law recognizes very few

privileges. See Danny R. Collins, *South Carolina Evidence* 453-71 (2d ed. 2000), for a discussion of the privileges recognized in South Carolina. Three issues likely to arise in child abuse litigation are the psychologist-patient privilege, the attorney-client privilege, and the spousal communication privilege.

Psychologist-patient

South Carolina does not recognize a common law psychologist-patient privilege, but the General Assembly has created statutory protection for confidential communications to mental health providers. See S.C. Code Ann. § 19-11-95 (Supp. 2008). However, the statutory protection does not rise to the level of a testimonial privilege. Communications can be revealed pursuant to court order “for good cause” and when the mental health issue is “reasonably at issue in the proceeding.” See *id.* at § 19-11-95(D)(1). For more discussion, see Danny R. Collins, *South Carolina Evidence* 469-70 (2d ed. 2000). Cf. *Jaffee v. Redmond*, 518 U.S. 1 (1996) (recognizing a “psychotherapist privilege” for federal courts).

In a rare case, a communication between a psychologist and patient may fall under the protection of the attorney-client privilege. See *State v. Love*, 271 S.E.2d 110 (S.C. 1980) (discussing attorney-client privilege generally). In *State v. Thompson*, 495 S.E.2d 437 (S.C. 1998), the defendant, upon the advice of his attorney, hired a psychiatrist to examine him to determine whether he would be eligible for a sex offender treatment program. The defense attorney intended to use the results in his plea negotiations. During the examination, the defendant made incriminating statements and his attorney turned over a copy of the psychiatrist’s report to the solicitor. The defendant did not testify at trial in part because the court ruled the solicitor could use the psychiatrist’s testimony to impeach the defendant. *Id.* at 438.

The court ruled first that attorney-client privilege protected the statements made by the defendant to the psychiatrist. The court held that communications are within the scope of the privilege when “made by a defendant to an expert in order to equip that expert with the necessary information to provide the defendant’s attorney with the tools to aid him in giving his client proper legal advice.” *Thompson*, 495 S.E.2d at 439 (quoting *State v. Pratt*, 398 A.2d 421, 423-24 (Md. Ct. App. 1979)). The court also held the privilege was not waived when the attorney turned the report over to the state. The court refused to infer that the client impliedly waived the privilege through his attorney’s actions, instead holding that the client intended the attorney only to make a recommendation based on the report, and not to reveal his incriminating statements. 495 S.E.2d at 439.

In contrast to the attorney-client protection given to experts hired by the defense, communications by experts hired by the prosecution are not necessarily granted the same cloak of privilege. Constitutional and procedural rules, discussed below, raise additional considerations in determining whether statements made by a child to a therapist must be disclosed to the defense.

Clergy-penitent

Communications between a clergy member (“duly ordained minister, priest, or rabbi”) and penitent are privileged. S.C. Code Ann. § 19-11-90 (2003). The text of the statute must, of course, be consulted in examining a specific communication.³

Spousal Communications

Communications between a husband and wife are confidential and a spouse may not be required to testify in a criminal proceeding as to those communications. S.C. Code Ann. § 19-11-30 (Supp. 2008). However, this statutorily created privilege is specifically abrogated when the proceeding involves “child abuse or neglect, the death of a child, criminal sexual conduct involving a minor, or the commission or attempt to commit a lewd act upon a minor.” S.C. Code Ann. § 19-11-30 (Supp. 2008). The privilege belongs to the testifying spouse and cannot be used by the defendant to prevent the spouse from testifying. *State v. Motes*, 215 S.E.2d 190 (S.C. 1975). See Danny R. Collins, *South Carolina Evidence* 463-65 (2d ed. 2000).

C. Discovery of Reports Generated by Physical or Mental Examinations

Child sexual abuse victims may be attended by a number of medical and psychological professionals and the children are likely to disclose private, personal information that may or may not be related to their crime victimization. Recurrent questions arise concerning the degree to which the defense may delve into this private information.

In *State v. Trotter*, 473 S.E.2d 452, 455 (S.C. 1996), the court examined the parameters of the discovery rules in the context of the sexual assault of a child who was an adult at the time of trial. The victim testified concerning acts of sexual abuse committed against her by her father over the course of 22 years. After the defense attorney cross-examined her primarily on her delay in reporting the abuse, the prosecution called the victim’s counselor to testify as an expert concerning behavioral characteristics of child sexual abuse victims.

The defense attorney argued that the counselor should have been listed as a possible witness and that notes of her counseling sessions should have been disclosed as reports of physical or mental examinations under Rule 5. The court held:

- The prosecution was not obligated to disclose the fact that the victim had been in counseling. Rule 5(a)(1)(D) requires only that the prosecution allow the defense to inspect copies of results or reports of physical or mental examinations. If no “results or reports” are generated, the rule does not obligate the state to disclose the existence of the exam. 473 S.E.2d at 455.

³ The mandatory reporting statute was amended in 2003 to add clergy members to the list of mandated reporters. See S.C. Code Ann. § 63-7-310(A) (2008). However, if a clergy member received information in the context of a communications that would be protected as privileged under § 19-11-90, then the clergy member is not mandated to report. See S.C. Code Ann. § 63-7-420 (2008).

- Counseling sessions for sexual assault victims are not “physical or mental examinations” under Rule 5(a)(1)(D), SCRCrimP. 473 S.E.2d at 454.
- Notes from counseling sessions are “raw data,” not results or reports required to be disclosed under Rule 5(a)(1)(D), SCRCrimP. 473 S.E.2d at 455.

D. Production of Documents

Even though many solicitors maintain an open file policy, discovery rules may have an unintended impact on the prosecution of child abuse. Intra-familial child sexual abuse victims will inevitably be involved with DSS investigations which will generate numerous documents and reports. Moreover, children may be examined by professionals at the request of law enforcement and solicitors and they may also obtain private counseling and treatment.

Rule 5(a)(1)(C), SCRCrimP, requires the production of certain documents that are “within the possession, custody, or control of the prosecution.” Because multiple governmental and private agencies may be involved in the investigation of child sexual abuse, the limits of this rule are unclear. For example, if a jurisdiction has a non-profit child advocacy center that conducts child interviews as well as therapy, are records kept of the child’s therapy sessions discoverable? Are DSS records deemed to be within the possession, custody, or control of the solicitor?

The limits of this rule have only been touched upon in appellate opinions. In a case involving documents in the possession of a business that had been the victim of financial crimes, the court held that Rule 5 only requires the prosecution to disclose evidence “actually in its possession.” *State v. Gullede*, 487 S.E.2d 590 (S.C. 1997). Evidence was not in possession of the prosecution when it was controlled by the corporation. Importantly, the court in *Gullede* explained: “The only exception to actual possession is where the evidence is in the possession of another governmental agency.” *Id.* at 593. *See also State v. Kennerly*, 503 S.E.2d 214, 220 (S.C. Ct. App. 1998) (citing *Gullede* and stating that the rule requiring disclosure “seems to also apply to evidence within the possession of other government agencies”). While the parameters of “custody and control” of documents within the control of other state agencies may result in future case law, *Gullede* and *Kennerly* could be interpreted to grant wide-ranging access to DSS documents and potentially to documents held by other organizations. *See also State v. Hill*, 597 S.E.2d 822, 829 (S.C. Ct. App. 2004) (in the context of probation revocation, the court held that the Department of Probation, Parole and Pardon was required by Rule 5 to turn over local police and SLED documents even though they were not in the actual possession of the Department).

In *State v. Lawton*, 675 S.E.2d 454 (S.C. Ct. App. 2009), a letter written by appellant to ex-wife was not disclosed pursuant to Rule 5(a)(1)(A), SCRCrimP. Prosecution used letter to impeach appellant during cross-examination. Trial court agreed with prosecution argument and decided that Rule 5 did not require disclosure of evidence on a collateral issue and was not relevant within the meaning of Rule 5(1)(1)(A).

Holding the letter was relevant pursuant to SCRE 401 and prosecution's failure to turn over letter prejudiced appellant, court of appeals reversed.

E. Protection of Documents

In contrast to Rule 5(a)(1)(C), documents "made by the attorney for the prosecution or other prosecution agents in connection with the investigation or prosecution of the case" are not subject to blanket discovery. Rule 5(a)(2), SCRCrimP. Thus, if DSS is deemed an agent of the prosecution, documents in its control may be exempt from defense discovery under this rule.⁴ On first glance, protecting DSS records under this rule may appear advantageous to the prosecution.

Such an exemption, however, raises the possibility that the prosecutor will be held responsible for exculpatory evidence held by DSS even if the prosecutor has no actual knowledge of the exculpatory evidence. For example, in the Virginia case of *Ramirez v. Commonwealth*, 456 S.E.2d 531 (Va. Ct. App. 1995), the court held DSS employees to be agents of the prosecution with their reports not subject to discovery under a provision similar to Rule 5(a)(2). At the same time, however, the Virginia court held that since DSS is an agent of the prosecution, information known to DSS would be imputed to the prosecution even if the prosecution had no actual knowledge of the information. Thus, a judicial determination that information is within the custody and control of the prosecutor can cut either for or against the prosecution in a given case.

F. Adjudications of Delinquency

SLED or DJJ must provide a copy of a person's juvenile record to the Attorney General, a solicitor, or a law enforcement agency investigating a criminal case. *See* S.C. Code Ann. § 63-19-2030 (2010). Similarly, defense counsel must be granted access to his or her own juvenile client's records. *See* S.C. Code Ann. § 63-19-2010 (2010). *See also State v. Riddle*, 353 S.E.2d 138 (S.C. 1987)(error for the state, in response to discovery request, to fail to turn over the defendant's juvenile record), *overruled on other grounds*, *State v. Torrence*, 406 S.E.2d 315 (S.C. 1991). Juvenile records may be used to impeach a defendant in a subsequent criminal prosecution. *See State v. Mallory*, 242 S.E.2d 693 (S.C. 1978).

Unless otherwise provided in S.C. Code Ann. § 63-19-2020 (2010), all other juvenile records may be disclosed only by order of the court "to a person having a legitimate interest and to the extent necessary to respond to that distinct interest." S.C. Code Ann. § 63-19-2020(A) (2010). For example, a defendant who demonstrates a "substantial need and legitimate interest" in a juvenile's records may be granted access to these records. *State v. Sparkman*, 339 S.E.2d 865 (S.C. 1986) (applying section 20-7-780, which was repealed and substantially rewritten as section 20-7-8510 and is now found in section 63-19-2020). In

⁴ Note that a defendant may seek DSS records in an indicated case directly from the department. *See* S.C. Code Ann. § 63-7-1990(B)(5) (2010).

Sparkman, the court held that the trial court impeded a defendant's opportunity to effectively cross examine a key prosecution witness by prohibiting defense counsel from questioning the witness about prior juvenile records and plea agreements with the prosecutor. Moreover, the trial court erred in categorically denying access to juvenile records without assessing whether the defendant had a "legitimate interest" in the records. 339 S.E.2d at 867.

G. Constitutional Issues Affecting Discovery

Confidential Victim Records

Under certain circumstances, due process may compel defense access to records declared confidential by statute or privilege. However, South Carolina courts have not identified the point at which due process outweighs a statutory privilege. For example, in *State v. Parker*, 366 S.E.2d 10 (S.C. 1988), the defendant claimed that one of the state's witnesses was the perpetrator, and the defendant sought disclosure of the witness' psychiatric records from the Department of Mental Health. The court held that the statute governing confidentiality of the records enumerated the exceptions under which disclosure is allowed, none of which applied. Thus, the defendant was denied access to these records. The court did not analyze the constitutional implications of this decision.

Denial of the opportunity to cross-examine about a witness' juvenile record can violate a defendant's confrontation right. *See Davis v. Alaska*, 415 U.S. 308 (1974). A defendant's right to cross-examine witnesses does not grant unlimited pre-trial discovery, although due process may require at least *in camera* inspection of confidential records to identify material relevant to the defense. *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). The South Carolina Supreme Court has expressly applied *Ritchie*, holding that the trial judge must examine undisclosed evidence *in camera* before ruling on whether it is discoverable. *State v. Bryant*, 415 S.E.2d 806 (S.C. 1992).

Exculpatory Evidence

The requirement of *Brady v. Maryland*, 373 U.S. 83 (1963), that the prosecution disclose exculpatory evidence has generated a substantial body of complex case law. Although by no means the final word on *Brady* matters, the following cases discuss *Brady* in child abuse and other contexts.

- *Riddle v. Ozmint*, 631 S.E.2d 70 (S.C. 2006). Court reversed PCR court's decision which found no *Brady* violation where prosecution did not disclose to defense second pretrial statement of defendant's brother and police activity related to that statement. Court noted that there was no physical evidence linking defendant to murder and robbery charges, and that the prosecution's case relied solely on the testimony of defendant's brother and other witnesses. Finding inconsistencies among the brother's first and second pretrial statements and the brother's trial testimony in view of lack of physical evidence linking defendant to the crimes, court concluded that the PCR court's conclusion was not supported by the record.

- *Simpson v. Moore*, 627 S.E.2d 701 (S.C. 2006). Court held that the PCR court erred and held the prosecution's failure to inform defense that a bag of money was found behind a counter near a cash register at the scene of the crime prejudiced defendant at the penalty phase of the trial wherein the armed robbery was an aggravating circumstance that allowed the State to seek the death penalty.
- *State v. Jones*, 479 S.E.2d 517 (S.C. Ct. App. 1996). A child initially disclosed only that she had been present while another child was sexually assaulted. A week before trial she told the prosecutor that she was in fact also sexually assaulted. At trial, the prosecutor did not elicit this information from the child, but it came out on cross-examination. The court held there was no prejudice to the defendant in the prosecutor's non-disclosure as the defendant was able to impeach the child with the inconsistency.
- *Clark v. State*, 434 S.E.2d 266 (S.C. 1993). Medical records in the child victim's previous DSS files from North Carolina contained two notations: "warts venereal (?)" and "venereal (?) warts." A PCR judge granted post-conviction relief to a defendant in part on the grounds that this was newly discovered exculpatory evidence. The court disagreed, holding the notations were not "material exculpatory or impeaching evidence because there is no reasonable probability the result would have been different had the evidence been disclosed."

IV. Defense Examinations of Victims

A. Physical Examination

Defendants occasionally argue that a victim of child sexual abuse should be required to submit to a physical examination conducted by a court-appointed or defense-requested physician. The starting point for analysis is whether courts have the authority to order such an examination. Some courts hold that they have no such authority. *See People v. Lopez*, 800 N.E.2d 1211 (Ill. 2003); *State v. Joyce*, 389 S.E.2d 136 (N.C. Ct. App. 1990). That is, since a child victim is not a party to the case and is not under the control of the prosecutor, the court has no authority to compel the child to submit to a physical examination. *See Lopez*, 800 N.E.2d at 1216-17. As stated by the Virginia Supreme Court:

[I]f an accused in Virginia has no right to interview a rape case victim, and no right to discover statements made by Commonwealth's witnesses to agents of the Commonwealth, and no right to discover certain internal Commonwealth documents, surely the accused should have no right to a physical examination of the victim in a statutory rape case. And we so hold.

Clark v. Commonwealth, 551 S.E.2d 642, 644 (Va. 2001).

While on one level this is an appealing (and logical) argument, some courts adopting this approach also hold that trial courts may penalize the prosecution if the victim chooses not to cooperate. Thus, *Lopez* held that the trial court could assess the state's medical evidence and preclude introduction of some of this

testimony if the court determines that the victim's lack of cooperation impairs a defendant's right to a fair trial. *Lopez*, 800 N.E.2d at 1220-21.

A different approach followed by other states is one that presumes the authority of the trial court to order an examination, but allows such examinations only if the defendant demonstrates a "compelling need" for the exam. For example, the Tennessee Supreme Court has stated:

We think the practice of granting such physical examinations should be engaged in with great care and only upon a showing of compelling need by the defendant. Other courts have observed, and we agree, that the highly intrusive nature of a physical exam raises the same concerns about emotional trauma, embarrassment, and intimidation to the child victim that are present with psychological examinations.

State v. Barone, 852 S.W.2d 216, 222 (Tenn. 1993) (internal citations omitted).

Courts adopting a "compelling need" approach have largely followed factors set forth by the Rhode Island Supreme Court in assessing that need. In *State v. Ramos*, 553 A.2d 1059 (R.I. 1989), that court held that the following factors should be examined when looking at the need for a physical examination: "(1) the complainant's age, (2) the remoteness in time of the alleged criminal incident to the proposed examination, (3) the degree of intrusiveness and humiliation associated with the procedure, (4) the potentially debilitating physical effects of such examination, and (5) any other relevant considerations." *Id.* at 1062.

Other decisions adopt this test. See *People v. Chard*, 808 P.2d 351 (Colo. 1991); *State v. McIntosh*, 58 P.3d 716 (Kan. 2002) (reviewing cases and following *Barone* and *Ramos*); *State v. Delaney*, 417 S.E.2d 903 (W. Va. 1992).

In the final analysis, courts adopting the "compelling need" approach recognize limited circumstances under which a defendant may be entitled to a physical examination of a victim; however, defendants must meet a high standard in establishing the need for such an intrusive examination. In light of the South Carolina Supreme Court's decision of *In re Michael H.*, 602 S.E.2d 729 (S.C. 2004), solicitors should be prepared for arguments to follow this approach with independent physical examinations of child victims.

B. Psychological Examination

As with requests for physical examinations, defendants who request to have their own psychological expert examine a child witness must prove a compelling need for the exam. It is the rare case that justifies such an extraordinary measure, and in most jurisdictions courts are almost always prohibited from issuing such orders. As stated by one author:

Clearly the overwhelming majority of jurisdictions that have addressed the question of the propriety of a psychological or mental examination of a complainant have held that

there is either no authority for such an examination or that such examinations are improper. Most courts have rejected a psychological examination of a complainant on the grounds that there has not been a substantial or compelling need shown for the examination.

Paul DerOhannesian, *Sexual Assault Trials*, vol. 1, § 1.18, at 40 (2d ed. 1998).

The South Carolina Supreme Court ruled on this issue for the first time in 2004. *In re Michael H.*, 602 S.E.2d 729 (S.C. 2004). Michael H. was convicted as a juvenile for criminal sexual conduct with a minor who was four or five years old at the time of the assault. During cross-examination of the victim's counselor at trial, the juvenile's attorney discovered that the victim had told his counselor that he heard voices of men who told him to say mean things to his friends and to hurt them. The counselor thought these voices might be "auditory hallucinations." *Id.* at 731. The juvenile's attorney then renewed a pre-trial motion to have the victim submit to a psychological examination. The trial court denied this motion. On appeal, the supreme court affirmed the court of appeals ruling that would have permitted a psychological examination of the victim under these circumstances. 602 S.E.2d at 732.

The court adopted the approach of *State v. Delaney*, 417 S.E.2d 903 (W. Va. 1992), which delineates six factors courts should look at when assessing the need for an independent examination: the intrusiveness of the examination; the victim's age; the physical and emotional impact of the exam on the child; the probative value of the exam; the remoteness in time between the exam and the criminal act; and the other evidence available for the defendant's use. 602 S.E.2d at 732-33. The court held that, under the circumstances of this case — particularly the concern about "auditory hallucinations" — the trial court would have been acting within its discretion to order an exam. *Id.* at 735.

On one level, the *Michael H.* decision is not extraordinary. When the mental health of a victim is in question, many jurisdictions would allow an independent psychological examination of the victim to help the court assess whether the victim is competent to testify at trial. *See Myers, Myers on Evidence of Interpersonal Violence*, § 2.15, at 177 – 78 and § 6.22 at 559 – 566 (5th ed. 2011). However, the court is not entirely clear that the basis of its decision is on the grounds of competency to testify, nor is it clear why such a rule applies only to child victims. Moreover, the court cites several cases that stand for propositions beyond the situation of a victim with serious mental health concerns. 602 S.E.2d at 732. Thus, while the case can be read narrowly, it is also conceivable that the case could be used to make broad-based challenges to the testimony of child witnesses.

Because of the potentially narrow reading that could be given to *Michael H.*, other courts' approaches to these types of exams are provided below.

Exams to Assess a Child's Credibility

A few courts hold that compelled psychological examinations of witnesses are permissible when the credibility of a witness is at issue. *See Jenkins v. State*, 668 So. 2d 1003 (Fla. Dist. Ct. App. 1996). Even then, however, most courts require a “strong and compelling need” for an evaluation. *See e.g. State v. Vaught*, 672 N.W.2d 262 (Neb. Ct. App. 2003) *aff'd* 682 N.W.2d 284 (Neb. 2004). The rationale behind allowing an expert to assess credibility is a remnant of the view that women and girls who allege rape should be viewed with suspicion.

Most modern courts will not order a psychological examination for the purpose of determining a rape victim's credibility. *See Myers, Myers on Evidence of Interpersonal Violence*, § 6.22(A), at 562 - 66 (5th ed. 2011). Credibility is determined by the finder of fact and goes to the weight, not admissibility, of testimony. *See State v. Wright*, 237 S.E.2d 764, 766 (S.C. 1977) (“It is axiomatic that the credibility of the testimony of [co-defendants] is for the jury. The duty of determining which statements of the witnesses was the truthful one was a matter exclusively for the jury”)

Exams to Assess a Child's Competence

All witnesses, including child witnesses, are presumed competent to testify. Rule 601, SCRE. A rare case raises a question as to a witness' competence — almost always when a diagnosable mental disorder exists — and courts under these circumstances may appoint an expert to independently evaluate the witness and opine as to the witness' competence to testify. *See, e.g., Simmons v. State*, 683 So. 2d 1101 (Fla. Dist. Ct. App. 1996) (adult witness with mental retardation). The trial judge, however, ultimately determines whether the witness is competent.

Defense attempts to compel a psychological examination of a child for the purpose of determining competency are usually unsuccessful. For an exam to be ordered, the defendant must demonstrate strong and compelling reasons why the competence of the witness is suspect. *See, e.g., Bart v. Commonwealth*, 951 S.W.2d 576 (Ky. 1997) (distinguishing prior case law and refusing to compel psychological exam to determine competence); *State v. Allen*, 647 So. 2d 428 (La. Ct. App. 1994) (refusing to compel psychological exam). *See generally* Paul DerOhannesian, *Sexual Assault Trials*, vol. 1, § 1.16 (2d ed. 1998); Gregory G. Sarno, Annotation, *Necessity or Permissibility of Mental Examination to Determine Competency or Credibility of Complainant in Sexual Offense Prosecution*, 45 A.L.R.4th 310 (1986).

On the rare occasion when an exam is ordered, the court should appoint an objective, neutral mental health professional to conduct the psychological examination of the victim. This evaluation should be limited to the issue of competency and not be used as a fishing expedition.

Exams Ordered on Grounds of Due Process and Fundamental Fairness

A few jurisdictions broadly hold that, in some circumstances, due process and fundamental fairness compel a court to grant a defendant the right to have the victim examined by an expert. For example, in *People v. Wheeler*, 602 N.E.2d 826 (Ill. 1992), a psychologist examined a victim at the state's request and the state proposed to have the expert testify that the victim was suffering from rape trauma syndrome. The court held that the state's use of rape trauma syndrome to prove the victim was sexually assaulted created a compelling need for the defendant to examine the victim. Under these circumstances, the court found the only way for the defendant to adequately challenge the state's expert is for a defense expert to interview the victim to determine if that expert would give the same diagnosis:

While it may be possible for an expert to form an opinion regarding rape trauma syndrome based only on a review of reports and trial testimony, this is clearly not the preferred method. An expert who has personally examined a victim is in a better position to render an opinion than is an expert who has not done so.

Id. at 832. Failure to allow an exam deprived the defendant of due process.

Similarly, in *State v. Maday*, 507 N.W.2d 365 (Wis. Ct. App. 1993), the court relied on a due process and fundamental fairness argument to require an independent psychological examination. In *Maday*, psychologists evaluated the victims at the request of the state and the experts then testified at trial that the children's behaviors were consistent with those of abused children. The Wisconsin court held that the defense was entitled to a level playing field when the state experts' conclusions were based on information obtained in the interviews and the defense had no means of testing the accuracy of the experts' conclusion short of having their own expert examine the children. *Id.* at 370-71. *Cf. Mack v. Commonwealth*, 860 S.W.2d 275 (Ky. 1993) (allowing exam based on due process and fundamental fairness when victim had a history of prior victimization and behavioral and psychological problems as a result). *But see United States v. Rouse*, 111 F.3d 561 (8th Cir. 1997) (en banc) (defendant failed to show denial of an exam resulted in fundamental unfairness).

Even where courts hold that examinations are required, examinations are permitted only in limited circumstances. In the cases allowing examinations on due process grounds, they have been ordered only when:

- The prosecution retained an expert in anticipation of trial to examine a child. *See State v. David J.K.*, 528 N.W.2d 434 (Wis. Ct. App. 1994) (independent exam not required when the state's expert witness is the child's therapist).
- The prosecution's experts were hired for the purpose of testifying that the child's behaviors were consistent with abuse. *See Maday*, 507 N.W.2d at 371.

If the defense motion is actually a challenge to the witness' credibility or competency, the defense must establish the need for an exam under the applicable test. *See Bart v. Commonwealth*, 951 S.W.2d 576 (Ky. 1997) (distinguishing *Mack v. Commonwealth* by focusing on competency of the victim).

Moreover, the remedy applicable to this exception is not exclusion of the child's testimony as may be argued by defense attorneys. Rather, if a defendant is denied access to the victim (or if the victim refuses to submit to the examination — see the discussion below), the court should refuse to allow the state to put on its expert to testify as to behavioral symptoms. The remedy is not exclusion of the child's testimony, or even exclusion of expert testimony for a different purpose. Rather, the court should not allow the expert to testify that, based on the expert's evaluation as requested by the state, the child's behavior is consistent with sexual abuse. *See People v. Wheeler*, 602 N.E.2d 826, 833 (Ill. 1992); *State v. Maday*, 507 N.W.2d 365 (Wis. Ct. App. 1993).

South Carolina solicitors should be aware of the *Wheeler* and *Maday* decisions since South Carolina case law allowing the state's experts to testify as to behavioral indicators is comparable to Wisconsin and Illinois law. Thus, solicitors who retain an expert solely for the purpose of evaluating a child and testifying as to behavioral indicators should anticipate defense motions to compel a separate examination of the child.

Authority of the Court to Compel an Examination of a Non-party Witness

Appellate courts in several jurisdictions have held that a trial court has no authority by statute, rule, or common law to compel a non-party witness to submit to a court-ordered psychological examination. Moreover, these courts hold that, even if a trial court were to order an examination, it has no mechanism for enforcing this order against a victim in a criminal case since the victim is not a party to the case.

For discussion of these issues, see *Barger v. State*, 562 So. 2d 650, 655-66 (Ala. Crim. App. 1989) (trial court has no authority to compel exam); *State v. Gabrielson*, 464 N.W.2d 434 (Iowa 1990) (court has no authority to compel a sexual abuse victim to submit to a psychiatric examination and no mechanism for enforcing such an order against a victim who is not a party to a criminal case); *State v. Robinson*, 835 S.W.2d 303 (Mo. 1992) (en banc) (courts are without the authority to order witnesses to submit to psychiatric examinations for the purpose of determining competency); *Gale v. State*, 792 P.2d 570, 575 (Wyo. 1990) (trial court has no authority to compel exam).

C. Taint Hearings

Direct Rebuttal of State v. Michaels

Appellate courts in other states have not rushed to adopt the *Michaels* analysis. To the contrary, many appellate courts addressing the question have declined to follow *Michaels*, holding that cross-examination and expert testimony are sufficient to challenge interview techniques. *See United States v. Geiss*, 30 M.J. 678 (A.F.C.M.R. 1990) (pre-*Michaels* case rejecting taint hearings); *United States v. Cabral*, 43 M.J. 808

(A.F. Ct. Crim. App. 1996) (rejecting taint hearings); *United States v. Kibler*, 43 M.J. 725 (Army Ct. Crim. App. 1995) (refusing to require a taint hearing when there was no evidence the children's statements were unreliable); *Commonwealth v. LeFave*, 714 N.E.2d 805 (Mass. 1999) (vacating a trial judge's order for a new trial that precluded child witness' testimony at the new trial); *Commonwealth v. Amirault*, 677 N.E.2d 652 (Mass. 1997) (rejecting claim that failure to preclude children's testimony resulted in a substantial miscarriage of justice); *Commonwealth v. Allen*, 665 N.E.2d 105 (Mass. App. Ct. 1996) (refusing to adopt *Michaels* and holding there was no evidence the children's statements were the result of suggestive interviewing); *State v. Olah*, 767 N.E.2d 755 (Ohio Ct. App. 2001) (declining to adopt taint hearings); *Frohne v. State*, 928 S.W.2d 570 (Tex. Crim. App. 1996) (trial counsel not ineffective for failing to argue for a taint hearing; the contention that the trial court would have found the child incompetent to testify was "at best, highly speculative"). *See also* Myers, *Myers on Evidence of Interpersonal Violence*, § 1.19, at 111 (5th ed. 2011) ("A number of post-*Michaels* decisions decline to adopt taint hearings. Courts that reject taint hearings generally rule that cross-examination and expert testimony are sufficient to critique defective interviewing.").

A few other states have followed the *Michaels* precedent. *See English v. State*, 982 P.2d 139 (Wyo. 1999) (declining to adopt a "taint hearing," but adopting a substantially similar rule); *Commonwealth v. Delbridge*, 855 A.2d 27 (Pa. 2003) (adopting *Michaels* and *English* approaches); *State v. Carol M.D.*, 983 P.2d 1165 (Wash. Ct. App. 1999) (adopting a taint hearing-type procedure).

However, even in some of these states, courts have shown caution in reversing based on taint. *See, e.g., Commonwealth v. Delbridge*, 859 A.2d 1254 (Pa. 2004) (upholding trial court's determination that defendant had not met his burden of persuasion in establishing taint); *In re A.E.P. and W.M.P.*, 956 P.2d 297 (Wash. 1998) (en banc) (reversed on other grounds) (state supreme court opinion that expressly rejected taint hearings in the dependency context before *Carol M.D.* was decided); *Morganflash v. State*, 76 P.3d 830 (Wyo. 2003) (upholding a trial court's refusal to hold a taint hearing); *Billingsley v. State*, 69 P.3d 390 (Wyo. 2003) (upholding trial court's refusal to hold a taint hearing).

The *Michaels* opinion represents a novel approach and it remains a minority view. For a full discussion of many additional challenges that can be made to the *Michaels* opinion, see Myers, *Myers on Evidence of interpersonal Violence*, § 1.19, at 110 – 112 (5th ed. 2011).

Limiting the Applicability of Michaels

The *Michaels* decision can be distinguished in the vast majority of cases on the grounds that the facts of *Michaels* and the research cited therein involve very young victims (five years old and younger). Wide ranging attempts to apply *Michaels* to all sexual assault cases are inappropriate. The premise of *Michaels* is that children are so suggestible they can be made to say and believe events that never occurred and that the adversarial system cannot reveal whether a child subjected to improper interview techniques is to be believed. This view is founded on psychological research; thus, it is necessary for prosecutors to be

familiar with the research and limit experts to what the research actually shows. Although the research is voluminous and the findings often conflict, most researchers agree on the following basic conclusions:

- There is no categorical relationship between age and suggestibility. An individual four-year-old could be highly resistant to suggestion while a 30-year-old could be highly susceptible to suggestion. A variety of complex factors affect an individual's suggestibility.
- Although there is no precise age, the level of suggestibility of older children (variously given as aged 9, 10, or 11) is virtually indistinguishable from adult levels of suggestibility.
- While individual differences exist, research demonstrates that children five years old and younger are generally more suggestible than older children and adults. The very youngest children — verbal three-year-olds — show the highest level of suggestibility.
- Children between the ages of five and ten, while remarkably resistant to suggestion, are more suggestible than adults and older children but less suggestible than pre-school children.
- The difference between child and adult suggestibility is a matter of degree. A large body of research demonstrates that adults can be made to believe events that never occurred. The child witness research attempts to determine how much more suggestible children are than adults.

See Karen J. Saywitz & Thomas D. Lyon, *Coming to Grips with Children's Suggestibility*, in Memory and Suggestibility in the Forensic Interview 85-114 (Mitchell L. Eisen et al., eds. 2002). For additional suggestions on distinguishing *Michaels*, see Myers, *Myers on Evidence of Interpersonal Violence*, § 1.19, at 110- 112 (5th ed. 2011).

V. Rape Shield Evidence

The rape shield statute should preclude most attempts to introduce evidence of a child's prior sexual conduct. S.C. Code Ann. § 16-3-659.1 (2003) (incorporated into Rule 412, SCORE). Evidence of a victim's sexual activity with persons other than the defendant are admissible only to show: (1) prior consensual sexual activity with the defendant; or (2) source or origin of semen, pregnancy, or disease about which evidence has been previously introduced at trial. In addition, the evidence must be relevant and its prejudicial effect must not outweigh its probative value.

Prior to submitting such evidence, the defense must: (1) file a written motion and offer of proof; (2) submit to an *in camera* hearing on the evidence; and (3) show the proffered testimony is true and accurate, relevant, and that it meets one of the statutory exceptions to the rape shield law. S.C. Code Ann. § 16-3-659.1(2) (2003).

A. Source of Semen, Pregnancy or Disease

When semen, pregnancy, or disease is an issue in a case, evidence that the defendant was not the source may be admissible. S.C. Code Ann. § 16-3-659.1(1) (2003). However, if the state offers no medical or serological evidence, the proffered testimony is irrelevant and inadmissible.

An unanswered question is whether evidence of physical injury to the victim opens the door to the defendant offering another source as the cause of the injury. While “injury” is not a specified exception in the statute, a defendant may argue (on constitutional, if not statutory, grounds) that he should be allowed to present evidence of the source of the injury. No South Carolina cases address this question. However, well established cases preclude third party guilt speculation. *See State v. Caulder*, 339 S.E.2d 876, 879 (S.C. Ct. App. 1986).

B. Evidence of Prior False Complaints

A defendant may assert that a victim has made false accusations of rape previously, and that these accusations are not within the purview of the rape shield statute. The supreme court in *State v. Boiter*, 396 S.E.2d 364 (S.C. 1990), set out a three part test for determining the admissibility of prior false complaints of sexual abuse by the victim: (1) the judge should first determine whether the accusation was false; (2) if determined to be false, the judge must determine if the prior report was too remote; and (3) if the prior complaint was false, the judge should determine relevancy by examining the “factual similarity between prior and present allegations.” *Id.* at 365. The court did not discuss the Rape Shield Statute.

In *Boiter*, there was an uninvestigated prior complaint with no evidence that it was false, and it was made nine years prior when the victim was eight years old. The court found no abuse of discretion for the judge not to allow the defendant to cross-examine the victim about the prior complaint. *See also State v. Sprouse*, 478 S.E.2d 871 (S.C. Ct. App. 1996) (prior allegation properly excluded because there was evidence only that the child’s grandmother — not the child herself — made the earlier suggestion that the child might have been abused).

Evidence of prior false complaints should be considered at an *in camera* hearing with the burden on the defendant to prove the falsity of the prior allegation. Such a showing should be difficult in that the defendant must show not merely that the complaint was made, but must present sufficient evidence to show the complaint was false. (The court in *Boiter* did not state a standard of proof that the defendant must meet in showing falsity).

C. Evidence Offered for a Purpose Other than Attacking a Victim’s Morality

In a variation of the prior false complaint argument, the supreme court held in *State v. Finley*, 387 S.E.2d 88 (S.C. 1989), that the defendant was entitled to testify that he saw the adult victim engaged in sexual intercourse with another man. Defendant claimed that the victim was making her allegation in retaliation for his witnessing her intercourse with the other man. Because it was not being offered to show the victim’s bad character, the court held the testimony did not fall within the purview of the rape shield statute, was necessary to the defense, and was therefore admissible.

Subsequently, the court of appeals held testimony of an adult victim's prior sexual activity admissible when the victim's testimony was inconsistent with the victim's prior sexual activity. In *State v. Lang*, 403 S.E.2d 677 (S.C. Ct. App. 1991), the male victim was asked on direct examination whether he was homosexual and he replied he was not. The court interpreted *Finley* to stand for the proposition that the rape shield statute "did not bar evidence of a victim's sexual conduct if the evidence was offered for a purpose other than to attack the victim's morality." *Id.* at 678. Here, because the evidence was admitted to challenge the victim's credibility, the court held the defendant was then entitled to present evidence as to the victim's homosexuality.

The court of appeals extended this reasoning to child victims in *State v. Grovenstein*, 530 S.E.2d 406 (S.C. Ct. App. 2000). The defendant was convicted on multiple counts of lewd acts and CSC with a minor for acts committed against three pre-pubescent boys. The defendant claimed that the boys had themselves been accused of engaging in sexual acts with a younger girl prior to the time they knew the defendant. The defendant argued that the trial court's refusal to admit evidence of the boys' alleged sexual activity with the girl was erroneous. The court of appeals agreed, holding that such evidence should have been admitted to show a potential source of the boys' sexual knowledge. The court stated: "[W]e hold that evidence of a child victim's prior sexual experience is relevant to demonstrate that the defendant is not necessarily the source of the victim's ability to testify about alleged sexual conduct." *Id.* at 411. The court further stated that the trial court must assess whether the prejudicial effect of such evidence outweighs its probative value.

Prosecutors must be careful, therefore, about opening the door to such testimony. For example, a common technique for corroborating a young child's testimony is to argue the child had no other source of knowledge about sexual activity. Such evidence may open the door to the defendant presenting evidence as to an alternative source of such knowledge. See Myers, *Myers on Evidence of Interpersonal Violence*, § 11.10(D) at 1101 – 1102, § 11.10(F), at 1107 - 1113 (5th ed. 2011)(discussing other possible defense arguments).

Part Three:

Trial and Post-trial Issues

I. Competence of Child Witnesses

Even though children are presumed competent, Rule 601, SCRE, a child's competence may be questioned at times. It is often the case that young children can distinguish the truth from a lie, but they have trouble conveying that they understand the difference. The real problem in such a scenario is the manner in which an adult questions a child. Such questioning may not be either age or developmentally appropriate.

Despite the problem's being created by an adult's manner of questioning, it is the child who is deemed incompetent. Fortunately, social scientists and lawyers in recent years have worked to create developmentally appropriate methods of assessing a child's competence. The research over the years has taught several important lessons:

- Children do poorly when asked to define "truth" and "lie," but they are good at identifying a lie when they are given an example.
- Children are better at identifying characters that would "get into trouble" than they are at explaining why lying is wrong.
- Children may be reluctant to identify lies when the "liar" is the person questioning them. For example, a common tactic is for a lawyer to ask a child in court: "If I tell you my coat is green, is that the truth or a lie?" Research indicates that some children are reluctant to imply that the adult questioner is lying.
- Children are very good at identifying true and false statements from diagrams.

See Thomas D. Lyon & Karen J. Saywitz, *Young Maltreated Children's Competence to Take the Oath*, 3 Applied Developmental Science 16 (1999).

There are several practical lessons from this research as it relates to competency assessments in court. First, some children may be better able to demonstrate competency when asked to identify truth and lies based on characters in diagrams. Second, the commonly used questioning techniques are problematic. Examples include asking young children: "If I said this tie is green, would that be the truth or a lie"; or "What happens if you tell a lie" presents problems for a child. Finally, there is abundant research showing that, when asked age-appropriate questions, even very young children can demonstrate competence.

In addition to employing aids such as the small booklet developed by Professor Lyon, there have been a number of initiatives to implement courtroom protections for children. One such initiative is an encouragement for prosecutors to move for appropriate relief in a case involving testimony of a child. Victor Vieth in *A Children's Courtroom Bill of Rights: Seven Pretrial Motions Prosecutors Should Routinely File in Cases of Child Maltreatment* suggests prosecutors move for the following relief:

- The court's order for a child friendly oath.
- The court's order requiring the attorneys to ask questions a child witness can understand.
- The court's order requiring the child's testimony to be taken at a time of the day when the child is functioning at the child's best and that provides the child with developmentally appropriate recesses.
- The court's order allowing the child the presence of a support person.
- The court's order prohibiting intimidating questioning.
- The court's order modifying the courtroom to meet the child's needs

Victor Vieth, *A Children's Courtroom Bill of Rights: Seven Pretrial Motions Prosecutors Should Routinely File in Cases of Child Maltreatment*, Center Piece, Vol. 1, Issue 2 (National Child Protection Training Center 2008). Mr. Vieth points out in his article that the National Center for Prosecution of Child Abuse has for some time urged use of such motions in its publication, *Investigation and Prosecution of Child Abuse* (3d ed. 2004).

Some legislatures have taken action on courtroom rights for children. For example, in May 2009, the Missouri General Assembly delivered the Child Witness Protection Act to the governor for signature. *See* Child Witness Protection Act, Mo. Rev. Stat. § 491.725 (2009); *see also* Tex. Code Ann. § 38.074 (2010). Courts in other jurisdictions have addressed some of the protections set forth in the proposed children's courtroom bill of rights. *See e.g. State v. Munroe*, 2011 WL 1303228 (N.H. 2011)(defense counsel asked incomprehensible questions); *State v. Dwyer*, 440 N.W.2d 344 (Wis. 1989)(court addresses need to question children in language they understand); *State v. Hakami*, 98 P.3d 809 (Wash. Ct. App. 2004)(trial court did not err in allowing two nine year old witnesses to carry a doll to the witness stand); *Sperling v. State*, 924 S.W.2d 722 (Tex. Ct. App. 1996)(no error to allow child to testify holding a teddy bear); *see also Delaware v. Van Arsdall*, 475 U.S. 673 (1986)(court may instruct counsel to refrain from questions that are confusing m misleading, ambiguous or unintelligible).

II. Courtroom Accommodations

A. Altering the Courtroom

A trial judge has broad discretion over the conduct of the trial. *State v. Bridges*, 298 S.E.2d 212 (S.C. 1982). Appellate courts will not interfere “unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way.” *State v. Sinclair*, 274 S.E.2d 411, 414 (S.C. 1981) (internal citation omitted). Although no South Carolina appellate opinions directly address these particulars, the trial judge’s discretion over the conduct the trial should encompass practical matters such as accommodating the child’s need for appropriate seating if the child is too small for the witness stand and allowing a child to hold a stuffed animal, blanket, or other comfort item while testifying.

A number of appellate courts in other jurisdictions have addressed altering the courtroom to meet the needs of a child witness. *See e.g., State v. Archie*, 733 N.W.2d 513, 533 (Neb. 2007)(trial judge introduced the child to the people in the court room and asked her to identify the defendant; in upholding the trial court’s accommodation for the child, the appellate court noted, “Recognizing the difficulties a particular child may face in trying to testify in a traditional courtroom setting, a judge may require that the environment in which a witness is to give testimony may be made less formal and intimidating.”); *Shaffer v. State*, 674 N.E.2d 1 (Ind. Ct. App. 1996) (appellate court rejected appellant’s argument that the trial court erred in allowing sisters, aged seven and eight, to testify from smaller courtroom); *In re Stradford*, 460 S.E.2d 173, 175 (N.C. Ct. App. 1995) (in upholding testimony by CCTV in a juvenile proceeding, the appellate court noted “our courts have systematically recognized that special exceptions to general courtroom procedures are often required to more effectively question child witnesses in sexual abuse case.”); *Commonwealth v. Brusgulis*, 496 N.E.2d 652, 656-57 (Mass. 1986) (the trial court tailored his competence inquiry to accommodate a three year old child and the appellate court upheld the trial court noting, “Judges have considerable latitude in devising procedures and modifying the usual rules of trial to accommodate children and other witnesses with special needs, so long as the defendant’s fair trial rights are not violated. Where such procedures may be necessary, they should be discussed in pretrial conferences so that the defendant has adequate notice and so that potential problems can be considered with greater deliberation than when they arise mid-trial.”).

B. Closed-circuit Television Testimony or Videotaped Testimony

The South Carolina Code allows the use of “closed or taped” sessions for child and other “sensitive” witnesses. S.C. Code Ann. § 16-3-1550(E) (2003) [formerly 16-3-1530(G)]. Because both constitutional and other issues related to the interpretation of the statute have been addressed by South Carolina courts in reported cases decided before the Supreme Court’s decision in *Crawford v. Washington*, 541 U.S. 36 (2004), prosecutors must consider the potential impact of *Crawford* on those issues.

Potential Impact of Crawford v. Washington on CCTV Cases

Even though *Crawford v. Washington*, 541 U.S. 36 (2004), by its terms, applies only to the case of an unavailable witness, the fundamental change in Confrontation Clause analysis brought about by *Crawford* raises the possibility that other Confrontation Clause issues could be affected by this decision. As an example, in *State v. Bray*, 535 S.E.2d 636 (S.C. 2000), the court applied *Maryland v. Craig*, 497 U.S. 836 (1990) with respect to the need for case-specific findings as to trauma occasioned not by the courtroom generally but by testimony in the presence of the defendant. Although the issue addressed in *Maryland v. Craig* has not been addressed by the Supreme Court since *Crawford*, defendants use *Crawford* to attack the continued viability of *Maryland v. Craig*. Those attacks have generally not been successful, but there is no Supreme Court precedent after *Crawford* specifically deciding the continued vitality of *Maryland v. Craig*. See *State v. Blanchette*, 134 P.3d 19, 22 (Kan. Ct. App. 2006)(child victim testifies by closed circuit television); *State v. Henriod*, 131 P.2d 232, 237 (Utah 2006)(trial court erred in ruling that child would not be permitted to testify by CCTV).

Until Confrontation Clause issues are firmly resolved by the United States Supreme Court, prosecutors should take extra care to follow established procedures when taking testimony by CCTV. Further discussion of *Crawford* follows below.

South Carolina Cases Involving CCTV and the Confrontation Clause

The South Carolina Supreme Court first interpreted Section 16-3-1550(E) in *State v. Cooper*, 353 S.E.2d 451 (S.C. 1987). In *Cooper*, the victim’s testimony was videotaped in one room while the defendant viewed the testimony through CCTV from another room. The defendant was provided with a second attorney to be with him while his attorney was in the room with the child during the testimony. The defendant was afforded constant contact with his attorney through headphones. The court held that this procedure did not violate the defendant’s federal or state confrontation rights nor did it violate the provisions of S.C. Code Ann. § 17-23-60 (stating that every accused shall have a right to meet the witnesses produced against him face-to-face). The court stated:

His counsel was permitted to cross-examine without limitation. [Defendant] was enabled to view the proceedings and assist counsel in the cross-examination. The presence of the

trial judge created a courtroom atmosphere. Moreover, the procedure did not lessen the reliability of the victim's testimony. The jury, through the videotape, was able to observe the victim's appearance and demeanor throughout her testimony.

353 S.E.2d at 456.

The court found that the public policy of protecting children overrode defendant's right to face-to-face confrontation, so long as a determination is made on a case-by-case basis of the need for such procedures. 353 S.E.2d at 456.

In *State v. Murrell*, 393 S.E.2d 919, 921-22 (S.C. 1990), the court set forth the requirements which must be met when invoking S.C. Code § 1550(E) as a basis to allow closed circuit television in an effort to protect a child witness. Those requirements include: the trial judge must make a case-specific determination of the need for videotaped testimony; the trial judge must place the child in as close to a courtroom setting as possible; and the defendant should be able to see and hear the child, should have counsel present both in the courtroom and with him, and communication should be available between counsel and appellant.

Case-Specific Determination of Need for CCTV Testimony

In making the case-specific determination, the trial judge should consider the testimony of an expert witness, parents or other relatives, other concerned and relevant parties, and the child. With respect to the trial judge's consideration of the testimony of the child, the court has provided the following guidance concerning the trial court's interview of the child:

Although we decline to adopt an absolute requirement, we reiterate our holding in *Murrell* that the better practice in these cases, when possible, is for the trial judge to personally interview the child prior to determining whether the use of CCTV is necessary. . . .

State v. Bray, 535 S.E.2d 636, 641 (S.C. 2000).

In *Bray*, the prosecution offered the testimony of child victim's mother and of an expert witness in the field of counseling. The expert witness had seen the child victim eight times for counseling. Both the child's mother and the expert testified that the child would be traumatized by testifying in defendant's presence. In affirming the court of appeals reversal and remand, the court disagreed with the court of appeals that the prosecution failed to present sufficient evidence of the necessity of having the child testify via CCTV. In the court's view, however, the trial court did not set forth case-specific findings as required by *Murrell*. The court provided the following guidance for trial courts:

We reiterate for the benefit of the trial judges of this state that in order to support the decision to utilize CCTV, case-specific findings must be set forth including references to testimony demonstrating the child witness will in fact be traumatized, not merely by testifying in a courtroom, or in front of a crowd of people or relatives, but by the presence of the particular defendant.

535 S.E.2d at 641.

In considering whether the testimony of an expert witness alone may establish the basis for the case-specific determination, the court in *In re Cisco*, 506 S.E.2d 536 (S.C. Ct. App. 1998) upheld the trial court's finding that the necessity of the child victim's testimony via CCTV was established solely by the testimony of an expert witness. The expert witness in *Cisco* was a child therapist who had treated the child victim on 18 occasions after the child was assaulted. Neither *Murrell* nor *Bray* address the issue of whether expert witness testimony alone may provide sufficient evidence on the necessity of the child's testimony via CCTV and the South Carolina Supreme Court has not directly addressed that issue.

Findings Must Be Particularized to the Child in Question

It is reversible error if particularized findings are not made about the child in question. For example, in *State v. Lewis*, 478 S.E.2d 861 (S.C. Ct. App. 1996), there was ample expert testimony about trauma to the multiple children who were victimized, but the court found there had been no specific finding of trauma to the one child who the defendant ultimately was convicted of abusing.

Trauma Must Be More than Nervousness or Excitement

In *State v. Lewis*, 478 S.E.2d 861, 864 (S.C. Ct. App. 1996), the court interpreted *Maryland v. Craig*, 497 U.S. 836 (1990), as holding that “a trial court’s decision must be based on the case-specific finding that the use of an alternative procedure is necessary to prevent a particular child from the trauma of testifying in the defendant’s presence.” Further, the court cited *Maryland v. Craig* for the proposition that the trauma must be more than de minimis, that is “more than mere nervousness or excitement or some reluctance to testify.” 478 S.E.2d at 864.⁵

⁵ Solicitors should be aware of a previous Court of Appeals decision which held that a finding of “necessity” does not necessarily mean a finding of trauma. In *State v. West*, 438 S.E.2d 256 (S.C. Ct. App. 1993), the expert did not testify the child would be traumatized — just that testifying in open court would impact the child’s ability to testify and would distract the child due to the child’s hyperactivity and attention deficit disorder. The court held such a finding was sufficient to justify videotaped testimony. Note, however, that in *West* the defendant was physically in the room from which the child testified. Solicitors should carefully consider the unique facts of this case along with *Bray*, *Lewis*, and *Maryland v. Craig* before relying upon *West* for the proposition that trauma need not be shown.

Procedures to Be Followed When Testimony Is Provided by CCTV

South Carolina statute and case law enunciate several specific rules which must be observed when a child victim's testimony will be presented by CCTV.

- The prosecution must provide advance notice of its intent to use closed-circuit television testimony. *See* S.C. Code Ann. § 16-3-1550(E) (2003) (requiring prosecutor or defense attorney to notify the court when a victim or witness needs special consideration).
- The defendant may be excluded from a hearing that determines the need for special procedures. *Starnes v. State*, 414 S.E.2d 582 (S.C. 1991). *See also Kentucky v. Stincer*, 482 U.S. 730 (1987) (holding a defendant's confrontation right does not extend to a competency hearing).
- The child must be in as close to a courtroom setting as possible. *State v. Murrell*, 393 S.E.2d 919, 921 (S.C. 1990).
- The defendant must be able to see and hear the child, have an attorney present both in the courtroom and with him, and be able to communicate with his counsel who is in the separate room with the child. *Murrell*, 393 S.E.2d at 921.

C. Seating a Child Out of the Line of Sight of the Defendant

The South Carolina Supreme Court relied upon the videotaped testimony case law in holding that seating a child witness in such a way that he cannot see the defendant does not violate confrontation rights of a defendant if the state makes an adequate showing of necessity. The State's interest in protecting a child from trauma justifies use of such a procedure, provided an individualized determination of necessity is made. *State v. Lopez*, 412 S.E.2d 390 (S.C. 1991) (relying on *Maryland v. Craig* for the proposition that the Confrontation Clause does not give the defendant an absolute right to face-to-face meeting with the witness presented at trial). *Compare Coy v. Iowa*, 487 U.S. 1012 (1988) (statute allowing use of a screen to separate the witness from defendant was unconstitutional when there was no individualized finding of the need for such a procedure).

D. Closed Courtroom

A long history of cases clarifies that a defendant's right to a public trial can give way to the needs of victims, upon an appropriate showing. *Waller v. Georgia*, 467 U.S. 39 (1984). The U.S. Supreme Court in *Waller* stated:

[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

467 U.S. at 48.

Prior to *Waller*, the South Carolina Supreme Court upheld the exclusion of the public during the testimony of a child sexual assault victim. *State v. Sinclair*, 274 S.E.2d 411 (S.C. 1981). In *Sinclair*, the court stated:

[T]he exclusion of members of the public from trials while a young victim of a sexual battery is testifying is not impermissible if the trial court is convinced of the necessity for doing so after balancing the interests of all parties. The exclusion, however, must only be as broad as are the needs of the witness under the peculiar circumstances of the case.

274 S.E.2d at 413.

For extensive discussion of the federal case law surrounding both the defendant's and the media's right to a public trial, see Myers, *Myers on Evidence in Interpersonal Violence*, § 3.08, at 241 - 246 (5th ed. 2011).

Among the factors often identified as creating a "necessity" are the following:

- Public policy expressed in the code's requirement that consideration be given to closed sessions for victims with special needs — which includes "very young" witnesses. S.C. Code Ann. § 16-3-1550(E) (2003).
- The need to protect a child from the shame and embarrassment of testifying in public about a degrading act committed by the defendant.
- Protecting a child from further trauma related to the embarrassment.
- Facilitating the child's testimony by limiting the number of people in the courtroom.
- Shielding children from exposure in the press.
- Courts consider factors such as "the child's age, the nature of the crime, the psychological fragility of the child, the preference of the parents, and the desires of the child." Myers, *Myers on Evidence of Interpersonal Violence*, § 3.08, at 244 (5th ed. 2011).

E. Miscellaneous Child Witness Issues

Uncorroborated Testimony of the Victim

The testimony of a sexual assault victim need not be corroborated. S.C. Code Ann. § 16-3-657 (2003) (testimony of victim need not be corroborated in prosecutions for first, second, or third degree criminal sexual conduct, criminal sexual conduct with minors, or assault with intent to commit criminal sexual conduct). See *State v. Schumpert*, 435 S.E.2d 859 (S.C. 1993) (upholding trial court's charge of this statute in CSC with a minor case); *State v. Rayfield*, 593 S.E.2d 486 (S.C. Ct. App. 2004) (upholding a jury charge that a child's testimony need not be corroborated).

Leading Questions

Leading questions are permissible when "necessary to develop the witness' testimony." Rule 611(c), SCRE. See *State v. Hale*, 326 S.E.2d 418 (S.C. Ct. App. 1985) (discussing leading questioning of child witnesses). See also *State v. Rogers*, 603 S.E.2d 910 (S.C. Ct. App. 2004) (trial court allowed leading

questions of adult witness who was deaf and communicated through “some vocalization combined with gestures”).

Sequestering Witnesses

Rule 615, SCRE, maintains the common law regarding sequestration of witnesses. The decision to sequester is within the trial court’s discretion, but Rule 615 prohibits exclusion of a party. *State v. Boyd*, 341 S.E.2d 144 (S.C. Ct. App. 1986). A motion to sequester may be denied if the court determines there are insufficient grounds to order sequestration. *Id.* The South Carolina Constitution ensure a victim’s right to be present at any criminal proceeding. S.C. Const. art. I, § 24(A)(3). Victims’ rights legislation further reinforces these rights. S.C. Code Ann. § 16-3-1500 - 1560 (2003 & Supp. 2008). A witness allowed to remain in the courtroom after the witness’ testimony may not coach the child victim during the child’s testimony. *State v. Smith*, 642 S.E.2d 627 (S.C. Ct. App. 2007) *vacated on other grounds*, 679 S.E.2d 176 (S.C. 2009) (court of appeals upheld trial court’s grant of defendant’s motion for new trial where aunt of child victim coached child victim by way of body language and non-verbal signals during victim’s testimony; supreme court agreed but found prosecution could not appeal grant of new trial).

Support Persons

The trial court’s inherent authority over the conduct of the courtroom should include allowing a support person to sit with a child during the child’s testimony. A defense argument may be made that the presence of a third person improperly evokes sympathy for the child or that a support person bolsters the child’s credibility in that the person’s body language or mere presence can indicate the support person believes the child. However, most jurisdictions consider as adequate protection an instruction by the court to the witness that the witness not talk with the child and not react to the child’s testimony. Additionally, the jury can be instructed not to draw inferences from the support person’s presence. *See generally* Myers, *Myers on Evidence of Interpersonal Violence*, § 3.04(H), at 207 – 210 (5th ed. 2011). No reported South Carolina cases rule on this issue but appellate case law from numerous other jurisdictions upholds the presence in court of support people for a child. *See e.g.*, *People v. Whitman*, 205 P.3d 371 (Colo. Ct. App. 2007)(victim’s sister); *State v. Dorton*, 617 S.E.2d 97 (N.C. Ct. App. 2005) (teenage victim’s mother); *State v. Torres*, 761 A.2d 766 (Conn. Ct. App. 2000)(not error to allow victim’s fiancé to sit beside her during testimony where victim had been subjected to long-term sexual abuse); *People v. Johns*, 65 Cal. Rptr.2d 434 (Ca. Ct. App. 1997)(victim’s mother); *State v. Hoyt*, 806 P.2d 204 (Utah Ct. App. 1991)(representative of victim’s assistance program); *State v. Jones*, 362 S.E.2d 330 (W.Va. Ct. App. 1987)(not error to allow seven year old witness to sit in foster parent’s lap while testifying).

With respect to a support person in the courtroom, *State v. Smith*, 642 S.E.2d 627 (S.C. Ct. App. 2007), *vacated on other grounds*, 679 S.E.2d 176 (S.C. 2009) sounds a cautionary note and solicitors should thoroughly prepare a support person for that person’s role at trial so that the support person does not

coach the child during the child's testimony. See also *Sharp v. Commonwealth*, 849 S.W.2d 542 (Ky. 1993)(conviction reversed where adult in courtroom gestured supportively as child victim testified).

Questions concerning sequestration arise if the support person also is a witness. Although the decision should be assessed in each case, the consideration of a crime victim's rights may weight in favor of allowing the support person to remain. The Victim and Witnesses' Bill of Rights has a definition of "victim" which includes a parent of a child victim. S.C. Code Ann. § 16-3-1510(1) (2003). When read in light of the victim's constitutional right to be present at any proceeding, a child's parent may have an argument for opposing sequestration of the parent. There may be cases in which a solicitor determines that it is not appropriate for a child's parent to be in the courtroom despite a parent's argument that the parent has a right to be present. In such situations, a solicitor should thoroughly explain to the parent why the solicitor believes the parent's presence is not appropriate and should inform the parent of other measures the solicitor has taken to protect the child. Those other measures may include the presence of a support person who is not a parent (examples include victims' advocates and children's advocacy center professionals). For additional discussion of legal issues concerning support persons on the courtroom and for additional case citations, see Myers, *Myers on Evidence of Interpersonal Violence*, § 3.04(H), at 207 – 211 (5th ed. 2011).

Forensic Interviews

State v. Jennings, No. 27043, 2011 WL 4356520 (S.C. 2011)

Following appellant's objection at trial to forensic interviewer's attempt to summarize her interviews with three children allegedly sexually abused by a neighbor, the State offered and the trial court admitted the written reports of the children's forensic interviews. The reports contained, among other things, the mother's account of her conversation with middle child during which the child revealed appellant had been abusing her. It also stated that mother told the forensic interviewer that the other children told mother that appellant had also touched them inappropriately. The "Conclusion of interview" section of the reports contained the forensic interviewer's conclusion that the children "provided a compelling disclosure of abuse by appellant."

The supreme court held the trial court erred in admitting the written interview reports. First, the reports contained inadmissible hearsay. Second, the reports impermissibly vouched for the children's veracity in characterizing the children's disclosures as compelling. Neither error was harmless given that there was no physical evidence presented and the case rested on the credibility of the children.

SCDSS v. Mary C., No. 4891, 2011 WL 444401 (S.C. Ct. App. 2011)

Court of appeals refused to reverse trial court's finding in a private custody case that the child's disclosure of sexual abuse by her father was not trustworthy based on the methodology employed by the child's therapist and a forensic interviewer who interviewed the child. The trial court relied on two

defense experts who concluded that the child had been subjected to inappropriate leading and suggestive questioning which was well below the appropriate standard and protocol for such interviews.

State v. Hill, No. 4856, 2011 WL 3273544 (S.C. Ct. App. 2011)

Appellant was convicted of two counts of criminal sexual conduct with a minor in the first degree and two counts of lewd act upon a child. At trial, the State presented testimony of an expert in the field of forensic interviewing who had interviewed the child victim. Over objection, the trial court admitted into evidence a DVD recording of the forensic interview of Victim which was played for the jury. The expert testified as to how, during an interview, he discerns whether a child may have been coached concerning allegations of abuse

The court of appeals held the forensic interviewer did not improperly vouch for the victim. The court noted that the forensic interviewer never addressed the veracity of victim and only testified as to the details the interviewer looks for in an interview to determine whether a child may have been coached. The court noted that the interviewer offered no opinion on whether victim was being truthful nor did he offer an opinion on whether the victim had been coached.

State v. Baker, 700 S.E.2d 440 (S.C. Ct. App. 2010)

Court of appeals held that, even if the trial court erred in qualifying the forensic interviewer as an expert witness, such error was not prejudicial in view of the instruction given to jury by judge. Court of appeals also rejected appellant's content that forensic interviewer's testimony constituted impermissible bolstering.

State v. Douglas, 671 S.E.2d 606 (S.C. 2009)

South Carolina Supreme Court found that the trial court had no need to qualify forensic interviewer (a victim's advocate in a county sheriff's office) as an expert witness. The officer testified only as to her personal observations, experiences and her interview with the victim. The court found appellant suffered no prejudice either as a result of the witness's testimony or by her qualification as an expert. The court also rejected appellant's assertion that the officer's the testimony vouched for the victim's veracity. The witness never stated she believed the victim or that the victim agreed to tell her the truth. The only opinion provided by the officer was that the officer concluded the victim needed a medical exam.

In footnote 2 of the opinion, the court noted that appellate courts in six other states have upheld qualification of expert witnesses in the field of forensic interviewing. With respect to qualification of forensic interviewers as expert witnesses, the court concluded in that footnote: "Although there may be a case in which qualification of an expert in this field is proper, we find no necessity in the present case."

South Carolina DSS v. Lisa C., 669 S.E.2d 647 (S.C. Ct. App. 2008)

Pursuant to S.C. Code Ann. 19-1-180, DSS offered in a family court intervention hearing the testimony of a psychologist who conducted forensic interview of the child. DSS attempted to have the psychologist who conducted the forensic interview qualified as an expert witness, but the trial court denied that request and did not qualify the psychologist as an expert witness. Court of appeals held the testimony from psychologist concerning hearsay statements made by child during the forensic interview inadmissible. The psychologist was not licensed in state at the time she interviewed child, and the statute provides that only hearsay statements “made by a child to a licensed family counselor or therapist” were admissible.

State v. Kirton, 671 S.E.2d 107 (S.C. Ct. App. 2008)

Appellant was convicted of criminal sexual conduct with a minor in the second degree. Evidence admitted at trial included the testimony of a medical doctor who conducted a forensic interview of the child victim. The forensic interview consisted of a one-on-one conversation lasting approximately thirty minutes followed by a medical examination. The medical doctor testified concerning her medical findings and opined that her medical findings were consistent with the interview conducted by the medical doctor. Appellant challenged the admissibility of the medical doctor’s opinion as impermissible hearsay. The court of appeals rejected that challenge noting that the testimony was offered not for the truth of the matter asserted but to demonstrate the basis for the doctor’s medical findings.

III. Hearsay

The rules of evidence provide the necessary framework for analyzing hearsay issues that commonly arise in the prosecution of child abuse. An exhaustive recitation of the possible hearsay problems cannot be given here, but several of the most common issues are presented below along with relevant cases.⁶

A. Non-hearsay

Prior Inconsistent Statements

Prior inconsistent statements are common occurrences when a child is a victim of sexual abuse. Due to threats, coercion, or family pressure, a child’s trial testimony may be inconsistent with statements given before trial. The rules of evidence treat prior inconsistent statements as non-hearsay so long as the declarant testifies at trial and is subject to cross-examination concerning the statement. Rule 801(d)(1)(A), SCRE. *See State v. Smith*, 424 S.E.2d 496, 499 (S.C. 1992) (holding prior inconsistent statement of witness in adult homicide prosecution admissible as substantive evidence); *see also State v. Stokes*, 673 S.E.2d 434 (S.C. 2009)(appellant made statement to uncle who informed law enforcement; at trial, uncle

⁶ Because much of the law of evidence established by case law preceding the Rules of Evidence was incorporated into the Rules, these cases remain relevant, though subject to re-interpretation under the rules. *See State v. Burroughs*, 492 S.E.2d 408, 413 (S.C. Ct. App. 1997) (“[G]iven that the pre-Rules res gestae cases contained the essential requirements of Rules 803(1) and Rule 803(2), those cases remain helpful when determining whether a statement is admissible under the Rules”).

denied making statement to law enforcement and prosecution offered testimony of law enforcement officer as to uncle's statement. Court upheld admission of statement under SCRE 613 and rejected Confrontation Clause challenge as uncle testified and was available for cross-examination.); *State v. Crawford*, 608 S.E.2d 886 (S.C. Ct. App. 2005) (affirming rule that a prior inconsistent statement is admissible as substantive evidence if the declarant testifies at trial and is subject to cross-examination).

This is consistent with pre-rules law. *See State v. Copeland*, 300 S.E.2d 63 (S.C. 1982) (adopting the rule that prior inconsistent statements are admissible as substantive evidence if the declarant testifies at trial and is subject to cross-examination). *See also* Danny R. Collins, *South Carolina Evidence* 133-35 (2d ed. 2000).

Under the rules of evidence, a party may impeach its own witness. Rule 607, SCRE. *See State v. Needs*, 508 S.E.2d 857, 863 n.6 (S.C. 1998) (discussing cases prior to the rules of evidence which would not have allowed this). Thus, a prosecutor may call a recanting child to testify, then impeach the child with prior inconsistent statements and use those prior statements for their substance. Clearly, a variety of factors will influence how you proceed with a recanting victim. For an overview of the law on prior inconsistent statements, see Myers, *Myers on Evidence of Interpersonal Violence*, § 7.10, at 648 – 661 (5th ed. 2011).

Prior Consistent Statements

Child witnesses often are impeached on cross-examination by innuendo that, for example, the child is lying to protect a boyfriend or to seek vengeance upon a step-father. When defense counsel expressly or impliedly accuses a child of “recent fabrication or improper influence or motive,” earlier statements consistent with the trial statement may be admissible. Rule 801(d)(1)(B), SCRE. The impeachment may take the form of questions such as “You love your mother, don’t you;” and “You’ve talked with your mother about this case a lot, haven’t you.”

The court recognized this principle in *State v. Jeffcoat*, 565 S.E.2d 321 (S.C. Ct. App. 2002). During cross-examination of the victim, defense counsel “specifically inquired whether Victim had talked to Mother about what she was going to say in court and whether the solicitor told Victim ‘what things to say in the courtroom.’” 565 S.E.2d at 324. The court determined that defense counsel’s questions implied that the mother and prosecutor had improperly influenced the child prior to trial. Therefore, the court upheld that admission of the child’s first disclosure of the abuse as a prior consistent statement. *Id.*

It is important to note that cross-examination that merely emphasizes prior inconsistencies does not necessarily amount to an accusation of recent fabrication. For example, in *State v. Saltz*, 551 S.E.2d 240 (S.C. 2001), defense counsel cross-examined a witness about a prior statement that was inconsistent with the trial testimony of the witness. About that questioning, the court stated:

Although questioning a witness about a prior inconsistent statement does call the witness's credibility into question, that is not the same as charging the witness with 'recent fabrication' or 'improper influence or motive.' . . . [Defense counsel] questioned the accuracy of the witness's memory; he did not charge her with recent fabrication or improper influence or motive.

551 S.E.2d at 245.

According to the court, since the cross-examination did not imply recent fabrication or improper influence, the prosecution should not have been allowed to introduce the prior consistent statement. *See also State v. Jarrell*, 564 S.E.2d 362, 368 (S.C. Ct. App. 2002) (admission of hearsay improper because there was no allegation of recent fabrication or improper influence).

The proponent of a prior consistent statement must also show the prior statement was made before the motive to fabricate arose (for example, evidence of marital discord). A prior consistent statement may be admitted to show the child made the same allegation before the alleged reason arose for the child to lie about sexual abuse. *See State v. Jeffcoat*, 565 S.E.2d 321 (S.C. Ct. App. 2002) (victim's statement was made prior to the victim's involvement with the prosecutor's office; thus the prior statement was made before any alleged improper coaching could have taken place). The pre-motive rule applies regardless of whether the proponent of the prior statement desires it to be admitted for its substance or for rehabilitation of the witness only. *See State v. Fulton*, 509 S.E.2d 819 (S.C. Ct. App. 1998).

Prosecutors may encounter at least two difficulties in practice. First, judges may not be satisfied that indirect suggestions made by defense attorneys amount to a charge that the child is lying. A prosecutor should meet that reluctance on the part of a judge by emphasizing that the rule allows prior consistent statements to "rebut an **express or implied** charge against the declarant of recent fabrication or improper influence or motive." Rule 801(d)(1)(B), SCRE (emphasis added). Despite a large body of literature and case law supporting the argument for admission, judges may remain reluctant to admit the evidence.

A second difficulty prosecutors may encounter is judicial inclination to limit the prior consistent statement to the time and place of the event. A prosecutor facing such an obstacle must point out that the rule of evidence imposes no such limitation. When a prior consistent statement is admitted under subsection (B) in response to a charge of recent fabrication or improper influence or motive, the prior statement is not limited to a description of the time and place. The time and place limitation applies only to statements admitted as part of the *res gestae* of the crime under subsection (D) (see discussion below).

Following are some of the cases cited by Professor Myers as triggering admissibility of a prior consistent statement (PCS): *United States v. Cherry*, 938 F.2d 748 (7th Cir. 1991) (PCS admissible; charge of fabrication inferred from extensive cross-examination); *United States v. Red Feather*, 865 F.2d 169 (8th

Cir. 1989) (PCS admissible; defense alleged victim was coached by social workers and was mad at father); *Nitz v. State*, 720 P.2d 55 (Alaska Ct. App. 1986) (PCS admissible; defendant argued victim was lying to get rid of him); *Smith v. State*, 538 So. 2d 66 (Fla. Dist. Ct. App. 1989) (PCS admissible; defense implied mother and the state influenced victim); *State v. Littlefield*, 540 A.2d 777 (Me. 1988) (PCS admissible; defendant implied 16-year-old was lying because she was mad at defendant); *Dearing v. State*, 691 P.2d 419 (Nev. 1984) (PCS admissible; length and intensity of cross-examination of child witness was intended to attack child's credibility); *Commonwealth v. McEachin*, 537 A.2d 883 (Pa. 1988) (PCS admissible; defense implied parents and prosecutors told her what to say). See Myers, *Myers on Evidence of Interpersonal Violence*, § 7.11(D), at 664 – 670 (5th ed. 2011).

Rule 106, SCRE, allows a party to require introduction of the remainder of a statement at the time a portion of the statement is originally proffered. In *State v. Patterson*, 625 S.E.2d 239 (S.C. Ct. App. 2006), the court upheld the trial court's decision to allow the prosecution, on redirect, to publish a witness' entire statement to police where defense counsel questioned the witness on cross concerning her statement to police.

Prior Statement Describing Time and Place of Sexual Assault

Prior consistent statements of sexual assault victims are admissible when limited to descriptions of the time and place of the event. Rule 801(d)(1)(D), SCRE. This rule embodies the common law "prompt complaint" rule, deeming a report of sexual assault reliable if made immediately after the assault. See *Jolly v. State*, 443 S.E.2d 566, 568 (S.C. 1994). The evidence is intended to corroborate the occurrence of the crime, not relate details about the incident. *Id.* Thus, testimony as to prior statements is limited to describing the time and place of the assault. Rule 801(d)(1)(D), SCRE (incorporating prior case law establishing the time and place limitation). The supreme court in a pre-rules decision that is consistent with many post-rules cases had made clear that such statements are limited:

[T]here is no rule allowing any and all statements made by the alleged victim to be admissible through hearsay testimony as long as the victim testifies during the case. It is true that when the victim takes the stand and testifies, evidence that she complained of an assault may be introduced to corroborate her testimony. This right is limited in nature, however. The particulars or details are not admissible but so much of the complaint as identifies 'the time and place with that of the one charged' may be shown.

State v. Munn, 357 S.E.2d 461, 463 (S.C. 1987) (citations and internal quotations omitted), *overruled on other grounds* *State v. Gentry*, 610 S.E.2d 494 (S.C. 2005).

The court may have modified its position set forth in *Munn* to the extent a statement may be admitted consistent with the Confrontation Clause. In *State v. Stokes*, 673 S.E.2d 434 (S.C. 2009), the court overruled *State v. Pfirman*, 386 S.E.2d 461 (S.C. 1989) and *Simpkins v. State*, 401 S.E.2d 142 (S.C. 1991) to the extent they hold that, where a declarant refuses to admit the statement imputed to him, the defendant is denied effective cross-examination in violation of his confrontation rights. The court in

Stokes noted the United States Supreme Court's opinion in *Crawford v. Washington*, 541 U.S. 36 (2004) wherein the court stated "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Stokes* at 438 citing *Crawford* at 59 n.9.

Numerous South Carolina cases have been reversed when statements were admitted that go beyond the scope of Rule 801(d)(1)(D). See *Sanchez v. State*, 569 S.E.2d 363 (S.C. 2002) (failure to object amounted to ineffective assistance even though defense counsel believed the hearsay did not bolster the victim's testimony); *Dawkins v. State*, 551 S.E.2d 260 (S.C. 2001) (PCR case finding failure to object to hearsay identifying the defendant amounted to ineffective assistance even though it was a deliberate trial strategy); *Skeen v. State*, 481 S.E.2d 129 (S.C. 1997) (PCR case finding failure to object to mother's hearsay testimony did not amount to ineffective assistance as most of the testimony would have been admissible as corroboration); *Simpkins v. State*, 401 S.E.2d 142 (S.C. 1991) (testimony went beyond corroborating time and place of assault), *overruled on other grounds*, *State v. Stokes*, 673 S.E.2d 434 (S.C. 2009); *State v. Barrett*, 386 S.E.2d 242 (S.C. 1989) (pre-rules case precluding PCS of 11-year-old victim); *State v. Burroughs*, 492 S.E.2d 408, 411-12 (S.C. Ct. App. 1997) (adult sexual assault case in which testimony went beyond time and place). *But cf.* *State v. Kirton*, 671 S.E.2d 107 (S.C. Ct. App. 2008) (medical doctor's testimony that the medical findings were consistent with the interview of the child were not offered for the truth of the matter but were admitted as forming the basis of the doctor's opinion as an expert witness); *Watson v. State*, 634 S.E.2d 642 (S.C. 2006) (defendant's counsel failed to object to testimony of witnesses who testified that child victim identified her abuser and provided details of abuse; court reversed PCR judge's decision that defendant's counsel was ineffective and held that counsel's reason for failing to object was reasonable).

Statements that Explain Why a Government Investigation Is Undertaken

General testimony regarding a law enforcement investigation is not hearsay. *State v. Brown*, 451 S.E.2d 888 (S.C. 1994). In *State v. Thompson*, 575 S.E.2d 77 (S.C. Ct. App. 2003), law enforcement officers responded to an anonymous report that an adult CSC victim's car had been found. At the scene, a bystander told the officers that a person had left the car and entered a house. The officers found the defendant at the house and he was subsequently questioned and later arrested for committing the CSC. At trial, defendant argued that the statement of the bystander was inadmissible hearsay. The court disagreed, holding that the statement was not admitted to prove the truth of the matter (i.e., that the defendant was driving the car), but rather the statement was admitted to explain why law enforcement went to the defendant's home. 575 S.E.2d at 81. See also *State v. Rice*, 652 S.E.2d 409 (S.C. Ct. App. 2007) (investigating officer's testimony concerning appellant's objection to being fingerprinted was not inadmissible hearsay); *United States v. Cromer*, 389 F.3d 662 (6th Cir. 2004) (law enforcement officer's testimony explaining how certain events occurred was not offered for the truth of the matter asserted and Confrontation Clause does not apply).

B. Hearsay Exceptions

Present Sense Impression and Excited Utterance

Prior to the rules of evidence, the res gestae exception combined the current present sense impression and excited utterance exceptions, requiring a statement to be both a present sense impression and an excited utterance to be admissible. Because the rules divide present sense impression and excited utterance into two separate exceptions, the prior law will be of limited precedential value under the rules. Nonetheless the court of appeals has found this precedent “helpful” in analyzing cases arising under the rules. *State v. Burroughs*, 492 S.E.2d 408, 413 (S.C. Ct. App. 1997).

The present sense impression exception is most likely to apply in the child abuse context when a person overhears comments made describing an assault as it occurs. Rule 803(1) SCRE. Because children are abused in secret, this almost never happens and, thus, this rule is unlikely to arise. See Myers, *Myers on Evidence of Interpersonal Violence*, § 7.12, at 673 – 675 (5th ed. 2011).

More likely is a child’s statement made in an excited state describing an assault. Rule 803(2), SCRE. The rationale and law surrounding excited utterances is that the startling event “suspends the declarant’s process of reflective thought, reducing the likelihood of fabrication.” *State v. Sims*, 558 S.E.2d 518, 521 (S.C. 2002) (internal citation omitted). According to the court in *Sims*, three elements must be met: “First, the statement must relate to a starting event or condition. Second, the statement must have been made while the declarant was under the stress of excitement. Third, the stress of excitement must be caused by the startling event or condition.” 558 S.E.2d at 521.

A critical issue often is whether a child remains “under the stress of excitement” when a statement is made hours after the critical event. In *Sims*, for example, a five-year-old child witnessed a fatal attack on his mother in the evening and he made a statement identifying the defendant as the attacker the following morning, approximately 12 hours after the event. The court stated: “While the passage of time between the startling event and the statement is one factor to consider, it is not the dispositive factor. Even statements after extended periods of time can be considered an excited utterance as long as they were made under continuing stress.” 558 S.E.2d at 521. The court noted that other factors to consider including the declarant’s age and the severity of the startling event. In view of the totality of the circumstances, the court held that the child was “under the continuing stress of excitement,” and therefore his statement identifying the defendant was admissible as an excited utterance. *Id.* at 522.

In contrast, the court of appeals held inadmissible a statement made by a child victim of a sexual assault several hours after an overnight attack by the father of a friend. *State v. Whisonant*, 515 S.E.2d 768 (S.C. Ct. App. 1999). In *Whisonant*, the defendant was convicted of committing a lewd act upon a child. The 12-year-old victim testified she was fondled during the night by the father of a friend with whom she was

spending the night. The next morning, the victim told her father, her stepmother, and the defendant's wife details of the molestation. At trial, the stepmother testified as to the victim's hearsay statement, relating also that the victim was shaking and crying as she related the incident.

The court of appeals reversed, first holding the details of the statement inadmissible under Rule 801(d)(1)(D) (prior consistent statement). 515 S.E.2d at 771. The court also found the statements not to constitute an excited utterance, pointing to the fact that the child did not make the statement until the next morning, nine hours after the assault. *Id.* at 772. The court held that even though it was cumulative, admission of the evidence was not harmless. *Id.* The court in *Sims* did not cite *Whisonant*, but clearly the court of appeals' case must be read in light of the subsequent *Sims* decision. See *State v. Sims*, 558 S.E.2d 518 (S.C. 2002).

Other excited utterance cases include the following:

- Statements of seven year old to her mother were admissible as excited utterance where victim made those statements to her mother upon her mother's return to the home the same day as the victim was sexually assaulted. *State v. Stahlnecker*, 690 S.E.2d 565 (S.C. 2010).
- Statement of two and a half year old was an excited utterance even though the child made the statement more than forty-five minutes after she was sexually assaulted and finding that the victim was not competent to testify did not preclude admission of her excited utterance. *State v. Ladner*, 644 S.E.2d 684 (S.C. 2007).
- Statement to a witness by another person allegedly involved in murder that victim was killed with shotgun which defendant tried to sell to witness was not an excited utterance and admission of the statement was not harmless error. *State v. Davis*, 638 S.E.2d 57 (S.C. 2006).
- The court of appeals upheld admission of a statement made by a child when the child had gone directly from the scene of the crime to his mother's house, "acted scared, and appeared to know that something was wrong." The court indicated the crime had just taken place and the child "immediately ran home" and told an adult while "still under the stress of excitement from seeing the assault." *State v. Brock*, 516 S.E.2d 212, 215 (S.C. Ct. App. 1999).
- A statement was not an excited utterance after a delay of several hours during which time the adult sexual assault victim thought about how she would tell her husband. *State v. Burroughs*, 492 S.E.2d 408 (S.C. Ct. App. 1997).
- The court upheld as res gestae the statement of a 17-year-old sexual assault victim to nurse while the victim was "hysterical" and "emotionally upset." *State v. Dennis*, 468 S.E.2d 674 (S.C. Ct. App. 1996).

- A delay of more than one hour by a seriously injured adult victim did not necessarily take it out of the res gestae of the event. *State v. Blackburn*, 247 S.E.2d 334 (S.C. 1978).

Although not currently accepted by South Carolina courts, some states recognize that child victimization often involves pressures that prohibit children from making statements contemporaneous with the event. As a result, a statement that is far in time from the incident may qualify as an excited utterance if the circumstances surrounding the making of the statement indicate some factor triggered the child to make the spontaneous declaration. For a detailed discussion of cases from other jurisdictions, see Myers, *Myers on Evidence of Interpersonal Violence*, § 7.13(c), at 689 – 694 (5th ed. 2011).

Statement for Purposes of Medical Diagnosis or Treatment

The primary inquiry under the medical diagnosis and treatment exception typically is whether a statement is “reasonably pertinent” to the diagnosis or treatment. Rule 803(4), SCRE. The following statements should be admissible under this exception:

- A detailed description of the patient’s medical history, including the medical care provider’s general diagnosis; decision to treat for STDs or HIV; decision to conduct a pelvic (genital) exam; and decision to conduct a rape kit protocol exam as a part of the diagnosis and treatment.
- A nurse should be permitted to detail certain information related by the victim as part of the SLED Sexual Assault Protocol. The information requested in the protocol is necessary to the diagnosis and treatment of the patient and may help explain the decision for forensic evidence collection (swabs). The sexual assault protocol form acts as the patient’s medical history, which is always used by medical staff to aid in the diagnosis and treatment of the patient. Thus, the nurse should be allowed to detail the patient’s emotional condition; the patient’s description of the assault (child complaint, medical history); the type of the assault and location site on the body; the time and place of the assault; and the condition of the patient’s clothing.
- Because the Rape Protocol Form serves as the patient’s medical history, it should be admissible to establish certain facts which may later relate to serology, DNA or trace evidence, such as: whether penetration occurred; whether ejaculation occurred; whether the patient bathed, showered, changed clothes, urinated, or cleaned their genital area; the time period between the assault and the exam; whether the physician used a Wood’s Lamp during the examination; and what procedure was used for swab/slide collection.

Cases applying the rule do not provide guidance as to the degree of detail to which a medical professional can testify. The following general principles have developed:

- A statement by an adult rape victim that the defendant asked her for a hug prior to the assault was not pertinent to the medical diagnosis or treatment. *State v. Burroughs*, 492 S.E.2d 408 (S.C. Ct. App. 1997).

- Identity of perpetrator is rarely, if ever, a factor upon which a doctor relies in making diagnosis in a sexual assault case. *State v. Brown*, 334 S.E.2d 816 (S.C. 1985) (adult victim). *See also State v. Hudnall*, 359 S.E.2d 59 (S.C. 1987), *overruled on other grounds by State v. Schumpert*, 435 S.E.2d 859 (S.C. 1993) (error to allow doctor to testify as to victim's statements about perpetrator's identity). The supreme court has reaffirmed this rule in the context of a child victim. *See State v. Camele*, 360 S.E.2d 307 (S.C. 1987) (error to admit statement to physician that defendant performed fellatio upon his son). Compare *Myers, Myers on Evidence of Interpersonal Violence*, § 7.15(D)(3)(a), at 750 - 754 (5th ed. 2011) (Professor Myers asserts that in child abuse litigation most courts allow identification of the perpetrator).

State of Mind

A statement concerning the declarant's emotional or physical condition at the time the statement is made may be admissible under the state of mind exception. Rule 803(3), SCRE. No South Carolina cases interpret this rule in the context of child abuse. *See Myers, Myers on Evidence of Interpersonal Violence*, § 7.16, at 776 – 788 (5th ed. 2011), for numerous examples of when this exception may apply.

Recorded Recollection

Rule 803(5), SCRE, allows use of a memorandum or record to refresh the witness' recollection concerning a matter about which a witness once had knowledge but now has insufficient recollection. However, admission of an investigator's notes taken during an interview of the defendant was held to be harmless error in *State v. Lindsey*, No. 4866, 2011 WL 3568573 (S.C. Ct. App. August 10, 2011), where the investigator testified and had no trouble remembering the details of the interview during his testimony.

Child Hearsay Statute

S.C. Code Ann. § 17-23-175 (Supp. 2010) allows the out-of court statement of a child under twelve when the statement is made during an investigative interview and when the statement meets the conditions set forth the statute. The statute requires the child to testify in the proceeding and be subject to cross-examination on the elements of the offense and on the making of the out-of-court statement. The statute requires that the child testify in order to conform to the Confrontation Clause analysis set forth in *Crawford v. Washington*, 541 U.S. 36 (2004) (see the discussion of *Crawford* immediately following).

The court of appeals in *State v. Hill*, No. 4856, 2011 WL 3273544 (S.C. Ct. App. Jul 27, 2011), rejected a *Crawford* challenge to admission of the DVD of the child victim's forensic interview. Appellant was convicted of two counts of 1st degree CSC with a minor and two counts of lewd acts with a minor. On appeal, appellant alleged that the trial court erred in admitting into evidence a DVD of the child's forensic interview and erred in allowing the State to question the forensic interviewer (who was qualified as an expert witness) regarding the content of the video.

In rejecting appellant's challenge to admission of the DVD of the child's forensic interview, the court noted that the conditions of S.C. Code Ann. § 17-23-175 (Supp. 2010) were met. The court further noted that admission of the DVD did not violate *Crawford v. Washington* as appellant was afforded an opportunity to cross examine the child victim who testified at trial and was subject to cross examination prior to the State's offering the DVD.

The court also rejected appellant's challenge to the trial court's admission of a portion of the forensic interviewer's testimony:

Q: And what do you consider – what do you in your capacity as a forensic interviewer when you are looking for details, what do you mean by details?

A: We're talking about like idiosyncratic details maybe for example were any lubricants used Things like that.

Q: And was that present in this interview?

A: Yes.

As to the last question, appellant argued that the forensic interviewer's testimony could be construed as indicating the expert's opinion was that the child witness was truthful and had not been coached. In rejecting appellant's challenge, the court recognized that it is impermissible for a witness to give testimony as to his or her opinion about the credibility of a child victim in a sexual abuse case (citing *State v. Dawkins*, 377 S.E.2d 298 (S.C. 1989)). The court, however, noted that the forensic interviewer in this case offered no opinion on whether the child was truthful nor did he opine as to whether the child had been coached.

Hearsay and the Forensic Interview Report

While S.C. Code Ann. § 17-23-175 (Supp. 2010) allows admission of the out-of-court statement of a child under twelve as set forth in the statute, forensic interviewers routinely draft interview reports following an interview with a child. Admission of such reports is problematical as demonstrated by the case of *State v. Jennings*, No. 27043, 2011 WL 4356520 (S.C. Sep. 19, 2011). In *Jennings*, appellant was convicted of two counts of committing a lewd act upon a minor. Appellant was a neighbor of three minor alleged victims aged eleven, nine and six. The nine year old child reported to her parents that appellant had inappropriately touched her. Subsequently, the eleven and six year old children disclosed that appellant had touched them inappropriately. Each child was interviewed by the same forensic interviewer. The State called the forensic interviewer as its first witness and asked her to briefly summarize what the children had told her during the interviews. Appellant objected and the trial court sustained the objection. The State then moved to admit the forensic interviewer's written reports into evidence. Over appellant's objection, the court admitted the written reports into evidence. Later in the

forensic interviewer's testimony, the court allowed the State to play the videos of each child's forensic interview. After the videos were played, each child testified that appellant abused them in the manner described in the forensic interviews.

On appeal, appellant challenged admission of the written reports on the grounds that they contained inadmissible hearsay and that they impermissibly allowed the forensic interviewer to vouch for the credibility of the children. Appellant further argued that the error in admission of the written reports was not harmless beyond a reasonable doubt. Appellant also challenged the trial court's admission of the videos before the children testified on the grounds that the admission of the videos prior to the children's testimony violated his right to due process and confrontation.

As to admission of the videos before the children testified, the supreme court found that appellant did not specifically object, on constitutional grounds, to admission of the videos before the children testified and that issue was not preserved for review.

The court held that admission of the forensic interviewer's written reports was error and that the error was not harmless beyond a reasonable doubt. The court stated, "Appellant specifically challenges the portions of the report where the mother related to [the forensic interviewer] that the middle child told her appellant molested her and specific things the victims told the forensic interviewer during the interviews. We find these portions of the written reports constitute inadmissible hearsay as they were out-of-court statements offered to prove that appellant did in fact inappropriately touch the girls in the way they claimed." In finding that admission of the reports was not harmless error, the court noted, "where credibility is the ultimate issue in a case, improper corroboration evidence that is merely cumulative to the victim's testimony is not harmless."

The court also held that introduction of the reports improperly vouched for the victims' credibility.

We find the trial court abused its discretion in allowing the State to introduce the reports because they allowed the forensic interviewer to improperly vouch for the children's credibility. In each report, the forensic interviewer stated that during the interviews, each child had "provide[d] a compelling disclosure of abuse by [appellant]." The forensic interviewer further concluded that each of the children provided details consistent with the background information received from their mother, the police report, and the other children. There is no other way to interpret the language used in the reports other than to mean the forensic interviewer believed the children were being truthful.

In finding that the error of improper vouching for the victims' credibility was not harmless beyond reasonable doubt, the court noted, "There was no physical evidence presented in this case. The only evidence presented by the State was the children's accounts."

C. Child Hearsay and the Confrontation Clause

If a hearsay declarant does not testify at a criminal trial, admission of the declarant's hearsay statement will be subjected to the critical analysis of *Crawford v. Washington*, 541 U.S. 36 (2004). Prior to *Crawford*, the Court had allowed an inquiry into the context of the making of a statement, allowing admission of statements bearing adequate "indicia of reliability" even when the declarant is unavailable to testify at trial. *See Ohio v. Roberts*, 448 U.S. 56 (1980).

In *Crawford*, the Court overruled *Roberts*, rejecting the concept of a "reliability" test if an out-of court statement is testimonial and a declarant is unavailable to testify. Rather, the Court held that, if an out-of-court statement is "testimonial" and the declarant is unavailable to testify at trial, the statement is admissible only if there has been a prior opportunity for cross-examination of the declarant. While not defining a "testimonial" statement with precision, the court identified the following as testimonial statements: testimony at a preliminary hearing; testimony before a grand jury; testimony at a former trial; and police interrogations. 541 U.S. at 68. Language used by the Court suggests that testimonial statements include most statements made by witnesses and victims during a police investigation. *See* 541 U.S. at 56, n. 7 ("Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse — a fact borne out time and again throughout a history with which the Framers were keenly familiar."). *See also Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009)(sworn certificates of analysis from state lab conducting chemical analysis upon police request were testimonial statements).

It is important to note that *Crawford* does not apply to cases where a witness testifies and is subject to cross-examination. *See State v. Stokes*, 673 S.E.2d 434 (S.C. 2009)(witness testified but denied making the statement about which defendant sought cross-examination; no *Crawford* violation because defense had opportunity to cross-examine); *State v. Gorman*, 854 A.2d 1164 (Me. 2004).

Crawford does not apply to probation proceedings. *See State v. Pauling*, 639 S.E.2d 680 (S.C. Ct. App. 2006); *Jackson v. State*, 931 So.2d 1062 (Fla. App. 2006); *Marsh v. State*, 818 N.E.2d 143 (Ind. Ct. App. 2004).

While *Crawford*'s Confrontation Clause holding does not apply to abuse and neglect cases in family court, the South Carolina Supreme Court has found a due process right to confrontation for a parent which requires that a child in a family court abuse and neglect case testify in the presence of the parent absent special circumstances. *See South Carolina DSS v. Wilson*, 574 S.E.2d 730 (S.C. 2002). Other state courts have a different view. *See Cabinet for Health and Family Services v. A.G.G.*, 190 S.W.3d 338 (Ky. 2006); *In re S.A.*, 708 N.W.2d 673 (S.D. 2005); *In re C.M.*, 815 N.E.2d 49 (Ill. App. 2004).

Because *Crawford* represents a fundamental shift in Confrontation Clause analysis, prosecutors should analyze admissibility of the out of court statement of a witness as follows.

- Does *Crawford* apply? If *Crawford* does not apply, no further analysis is necessary.
- If *Crawford* applies, is the statement testimonial?
 - ▶ If the statement is not testimonial, no further analysis is necessary.
 - ▶ If the statement is testimonial, the statement may be admitted only when:
 - ▶ The witness testifies; or
 - ▶ The witness is not available to testify and:
 - ▶ has been subject to cross examination at a prior time; or
 - ▶ a *Crawford* exception applies (e.g. forfeiture by wrongdoing or dying declaration).

What Constitutes a Testimonial Statement?

Courts examining *Crawford* have considered many types of statements. While cases are not consistent, the cases broadly establish the following rules:

- *Calls to 911 operators probably are not testimonial.* The Court in *Davis v. Washington*, 547 U.S. 813 (2006), held that the contents of a conversation between a victim of domestic violence and a 911 emergency operator were not testimonial. The court noted that the 911 operator was attempting to determine what was happening and not what happened. Cf. *Hammon v. Indiana* discussed below.
- *Statements made to responding officers generally are testimonial.* In *Hammon v. Indiana*, 547 U.S. 813 (2006), the Court held statements made by a domestic violence victim to police officers at the scene of the domestic violence were testimonial. The Court distinguished the statements taken at the scene from the statements to a 911 emergency operator in *Davis* by noting that the police officers at the scene were attempting to determine what happened. There was no emergency in progress and the victim's statements recounted what happened in response to police questioning sometime after the events were over.
- *Determining the primary purpose of police interrogation.* In *Michigan v. Bryant*, 131 S.Ct. 1143 (2010), the Court held that a gunshot victim's statements to police officers were not testimonial and that admission of those statements did not violate appellant's right of confrontation. The Court explained the "ongoing emergency" component of the primary purpose test set forth in *Davis v. Washington* and *Hammon v. Indiana*. Unlike those cases which involved domestic violence investigations, the police in *Bryant* were investigating a shooting. Police had been

dispatched to a gas station parking lot and found the gunshot victim mortally wounded (they arrived approximately twenty-five minutes after the shooting occurred). The gunshot victim provided a statement to the responding officers before he was taken to the hospital where he died. At trial, the police officers who had talked to the victim testified as to what the victim told them (including identification of the shooter and location of the shooting). Following his conviction for second degree murder and related offenses, defendant appealed challenging admission of the police officers' statements as violating his right to confrontation. In remanding the case to the Michigan courts for consideration of whether the victim's statements were admissible under Michigan's hearsay rules, the Court provided further explanation of the "ongoing emergency" component of its primary purpose test. The Court concluded, based on its review of the circumstances of the encounter as well as the statements and actions of the gunshot victim and the police, that the circumstances objectively indicate that the primary purpose of the interrogation was to enable the police assistance to an ongoing emergency.

- *Certificates of analysis* in the form of affidavits from a state laboratory indicating that the contents of bags subjected to analysis was cocaine were testimonial and were not admissible over defense objection unless the analysts were unavailable to testify at trial and the petitioner had a prior opportunity to cross examine the analysts. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009). With respect to the contention that the certificates of analysis were admissible as business or official records, the court noted:

Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because – having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial – they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here – prepared specifically for use at petitioner's trial – were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.

Melendez-Diaz v. Massachusetts, 129 S. Ct. at 2540 - 41.

- *Formal statements made to investigators are testimonial*. Especially when made in the context of an official station-house interview or interrogation, law enforcement questioning of a witness will almost certainly lead to the production of testimonial statements. *See, e.g., People v. Vigil*, 127 P.3d 916 (Colo. 2006) (7-year-old's statements in response to law enforcement interview is testimonial); *People ex rel. R.A.S.*, 111 P.3d 487 (Colo. Ct. App. 2004) (videotaped forensic interview of 4-year-old by law enforcement investigator); *In re Rolandis G.*, 902 N.E.2d 600 (Ill. 2008) (statement to law enforcement interviewer at a Children's Advocacy Center is testimonial).

- *Statements to child protective services investigators may be testimonial.* The following cases have held that statements produced as a result of social services interviews are testimonial. *Flores v. State*, 120 P.3d 1170 (Nev. 2005); *T.P. v. State*, 911 So. 2d 1117 (Ala. Crim. App. 2004); *State v. Snowden*, 867 A.2d 314 (Md. 2005); *State v. Courtney*, 696 N.W.2d 73 (Minn. 2005); *State v. Mack*, 101 P.3d 349 (Or. 2004) (en banc).
- *Statements made to Children's Advocacy Center personnel interviewing children are likely to be testimonial.* Since Children's Advocacy Centers are conducting interviews on behalf of law enforcement, the statement produced in these interviews are likely to be deemed testimonial. See *Contrereas v. State*, 979 So. 2d 896 (Fla. 2008)(CAC interview is testimonial); *People v. Warner*, 139 P.3d 475 (Cal. 2004) (statement produced in CAC interview is testimonial); *People v. Sisavath*, 118 Cal. App. 4th 1396 (Cal. Ct. App. 2004) (statement produced in CAC interview is testimonial). Compare *People v. Geno*, 683 N.W.2d 687 (Mich. Ct. App. 2004) (child made spontaneous statement to interviewer accompanying child to bathroom; the court held this was not a testimonial statement). But see *State v. Bobadilla*, 709 N.W. 2d 243 (Minn. 2006)(CAC interview not testimonial).
- *Statements to medical professionals.* *People v. Cage*, 155 P.2d 205 (Cal. 2007) (statement by child physical assault victim to treating physician at the hospital was not testimonial); *State v. Vaught*, 682 N.W.2d 284 (Neb. 2004) (statement by child victim to emergency room physician not testimonial); *State v. Lortz*, 2008 Ohio 3108 (Ohio Ct. App. 2008)(child's statements to nurse practitioner in a hospital setting were non-testimonial); *State v. Brown*, 2008 Ohio 3118 (Ohio Ct. App. 2008)(social worker interviewed ten year old to obtain information to facilitate medical exam and child's statements were non-testimonial); *State v. Muttart*, 875 N.E.2d 944 (Ohio 2007)(social worker who was also assistant director of a children's program interviewed child at a child maltreatment clinic in order to gather information for a medical exam and child's statements were non-testimonial). But see *People v. Vigil*, 104 P.3d 258 (Colo. Ct. App. 2004) (testimonial statement when doctor worked as part of a child protection team and conducted a "forensic sexual abuse examination"); *State v. Cannon*, 254 S.W.3d 287 (Tenn. 2008)(victim's statement to SANE nurse following her stabilization in ER were testimonial and not admissible; initial statements to ER personnel contained in medical records were not testimonial and were admissible); *State v. Ortega*, 175 P.3d 929 (N.M. 2007) (child's statements to SANE nurse were testimonial and not admissible).
- *Statements made to caretakers immediately after observation of injury are not testimonial.* See *State v. Ladner*, 644 S.E.2d 684 (S.C. 2007)(statements of two and a half year old child to her caretakers immediately after they found blood coming from her genital area were not testimonial); *In re S.R.*, 920 A.2d 1262 (Pa. Sup. Ct. 2007)(four year old's statement to mother); *Herrera-Vega*, 888 So. 2d 66 (Fla. Ct. App. 2004)(three year old's statements to mother and father). See also *State v. Brigman*, 615 S.E.2d 21 (N.C. Ct. App. 2005)(statements made to foster parent no testimonial); *State v. Walker*, 118 P.3d 935 (Wash. App. 2005)(statements of 11 year old in response to question from concerned mother were not testimonial).

What test applies to non-testimonial statements when the witness is unavailable?

The Court in *Crawford* held that the Confrontation Clause governs testimonial statements. The question arises about whether any Confrontation Clause analysis is required for non-testimonial statements or whether such statements are analyzed only under evidentiary rules. Thus, for example, if an excited utterance is made to a family member or stranger (rather than a law enforcement officer), then *Crawford* arguably does not apply, see e.g. *State v. Ladner*, 644 S.E.2d 684 (S.C. 2007). See also *State v. Brown*, 173 P.3d 612 (Kan. 2007) (Kansas Supreme Court thoroughly discussed *Crawford* and *Davis* and found the statement of an emotional unidentified bystander to an identified bystander non-testimonial and admissible as an excited utterance).

United States v. Saget, 377 F.3d 223, 227 (2d Cir. 2004) found statements of co-conspirators non-testimonial and admissible. The Wisconsin Supreme Court in *State v. Manuel*, 697 N.W.2d 811 (Wis. 2005) determined it would continue to apply an *Ohio v. Roberts* analysis to non-testimonial statements.

While the *Crawford* Court abrogated *Roberts* by highlighting its shortcomings and failures, the Court declined to overrule *Roberts* and expressly stated that the states were free to continue using *Roberts* when dealing with non-testimonial hearsay. . . . Therefore we join the jurisdictions that have used *Roberts* to assess non-testimonial statements.

697 N.W.2d at 826.

While the South Carolina Court of Appeals has spoken on the issue, the South Carolina Supreme Court vacated that portion of the court of appeals' decision and has not otherwise addressed the issue. *State v. Staten*, 610 S.E.2d 823 (S.C. Ct. App. 2005) *vacated in part*, 647 S.E.2d 207 (S.C. 2007).

Validity of Idaho v. Wright

The reasoning of *Crawford* casts serious doubt on the viability of child-specific cases such as *Idaho v. Wright*, 497 U.S. 805 (1990). In *Idaho v. Wright*, the Court held that a statement of a child victim who was not competent to testify at trial could be admitted if adequate indicia of reliability were demonstrated. Since *Crawford* completely changes the method of analyzing Confrontation Clause cases, the reasoning of *Wright* is almost entirely undermined. Moreover, even statements falling within established hearsay exceptions — such as excited utterances — can be challenged under *Crawford* if the statement is deemed “testimonial.” *Crawford*, 541 U.S. 36 at 58, n.8 (stating that a case involving a spontaneous declaration of a child victim to a police officer is “arguably in tension with the rule requiring a prior opportunity for cross-examination”). See also, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).

Of course, the Confrontation Clause is satisfied when a hearsay declarant is available at trial for cross-examination. See *Idaho v. Wright*, 497 U.S. 805 (1990). The opinion in *Crawford* does nothing to change this rule. Indeed, the Court stated with great clarity: “[W]e reiterate that, when the declarant appears for

cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.” *Crawford*, 541 U.S. 36 at 59, n.9. See *People v. Argomaniz-Ramirez*, 102 P.3d 1015 (Colo. 2004) (en banc) (rejecting the argument that confrontation must take place at the time of the out-of-court statement).

The post-*Crawford* case law is voluminous. Professor Myers’ book has a thorough discussion of post-*Crawford* case law and is a good point for beginning research on the case law. See Myers, *Myers on Evidence of Interpersonal Violence*, §7.25, at 845 – 886 (5th ed. 2011).

Forfeiture by wrongdoing

In both *Crawford* and *Davis*, the Supreme Court referred to the “forfeiture by wrongdoing “exception to the protections of the Confrontation Clause. The court first recognized that doctrine in *Reynolds v. United States*, 98 U.S. 145 (1878), and the doctrine is based on the principle of equity that a person responsible for the unavailability of a witness forfeits the constitutional right to confront that witness. For cases involving sexual abuse of children, an abuser may be responsible for the child victim’s unavailability through having killed or threatened the child or the child’s family or may have groomed the child in such a manner that the child is not available to testify. See generally, Myers, *Myers on Evidence of Interpersonal Violence*, § 7.27(B), at 893 – 900 (5th ed. 2011).

Giles v. California, 128 S. Ct. 2678 (2008), arguably limited the utility of the forfeiture by wrongdoing doctrine in child abuse cases not involving death of the child. In *Giles* the Supreme Court held the forfeiture doctrine may only be used when defendant’s acts causing unavailability were made with the purpose and specific intent of making the witness unavailable for trial. Despite the arguable limitation on using forfeiture in child abuse cases, prosecutors should continue to establish a foundation for using forfeiture in every case in which the defendant’s actions caused the child’s unavailability. Some guidance on using forfeiture is found in Victor Vieth and Tom Harbison, *Using the Forfeiture by Wrongdoing Confrontation Clause Exception in Child and Domestic Abuse Case after Giles v. California*, Center Piece, Vol. 1, Issue 1 (National Child Protection Training Center 2008). Professor Myers also offers the following opinion concerning forfeiture by wrongdoing in the context of child abuse cases:

Extending forfeiture by wrongdoing to situations where the perpetrator of child, intimate partner, or elder abuse threatens, coerces, or harms the victim in order to prevent the victim from obtaining assistance opens the door to otherwise inadmissible testimonial hearsay.

Myers, *Myers on Evidence of Interpersonal Violence*, § 7.27(B)(1), at 898 (5th ed. 2011).

IV. *Lyle* Evidence (SCRE Rule 404(b))

The seminal South Carolina decision on other act evidence is the well-known case of *State v. Lyle*, 118 S.E. 803 (S.C. 1923). In *Lyle*, the court adopted the widely recognized rule that evidence of prior crimes of a defendant is generally inadmissible in that it acts to predispose a jury to the defendant's guilt and "thus effectually to strip him of the presumption of innocence." *Id.* at 807. The court also recognized the traditional exceptions to this rule:

Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish, (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial.

118 S.E. at 807 (quoting *People v. Molineux*, 61 N.E. 286, 294 (N.Y. Ct. App. 1901)). SCRE 404(b) embodies this rule.

A. Physical Abuse Case Law

The most common means of admitting prior acts in cases of physical abuse is the common scheme or plan exception. To be admissible, the common scheme or plan must be established by clear and convincing evidence. There is a distinct difference between the South Carolina Supreme Court and the court of appeals with respect to admissibility of prior bad acts evidence, particularly in homicide by child abuse cases. For example, in *State v. Fletcher*, 609 S.E.2d 572 (S.C. Ct. App. 2005) the court of appeals affirmed admission of evidence that appellant had on prior occasions placed the child in the attic and handcuff the child to a bed. Finding no evidence that appellant was the person who placed the child in the attic or handcuffed the child to a bed, the supreme court reversed in *State v. Fletcher*, 664 S.E.2d 480 (S.C. 2008).

Establishing a Pattern

To be admissible under the common scheme or plan exception, there must be factual similarity between the prior act and the present crime which amounts to "more than just a general similarity." *State v. Parker*, 433 S.E.2d 831, 832 (S.C. 1993); *see also State v. Wallace*, No. 26703, 2009 WL 2488134 (S.C. 2009).

In *State v. Smith*, 470 S.E.2d 364 (S.C. 1996), the court found reversible error in the trial court's refusal to sever a homicide by abuse prosecution from an ABHAN prosecution of the homicide victim's brother. The ABHAN charge was based on multiple beatings of a two-year-old over the course of two months (December and January). The homicide charge was based on the killing of the ABHAN victim's one-year-old sister in January. As stated by the court:

Appellant admitted he had whipped Gabriel [the ABHAN victim] with a belt or switch. Gabriel's injuries were confined to his torso, buttocks, and arms. He had no bruises on his face or scalp. Dwitasia [the homicide victim] was killed by brutal blows to her head and neck from a blunt instrument or fist. There was no evidence Dwitasia had been previously beaten by appellant. In the case of the common scheme or plan exception under *Lyle*, a close degree of similarity or connection between the prior bad act and the crime is necessary. The connection between the prior bad act and the crime must be more than just a general similarity. The acts to which appellant admits are not sufficiently similar to the acts which caused Dwitasia's death.

Id. at 366 (citations omitted).

In *State v. Northcutt*, 641 S.E.2d 873 (S.C. 2007), the court held admission of evidence that baby had suffered a spiral fracture of her leg two months before her murder was error in view of evidence that injury resulted from accident.

In *State v. Holder*, 676 S.E.2d 690 (S.C. 2009), the court upheld the admission of photographs of co-defendant's child (co-defendants were child's mother and her boyfriend). The boyfriend killed the child and the photographs were taken approximately one month prior to the child's death. The photographs depicted faint bruising on the child's back and a small, triangular burn just below the child's elbow. The court found that the photographs established a continuous pattern of abuse and neglect and made it more probable than not that the child was the victim of abuse and neglect rather than accident.

The court also upheld the admission of a co-worker's testimony that mother had begun to dress differently and to talk less about her child after she started dating her boyfriend. The court found that the evidence demonstrated mother's strong desire to please her boyfriend instead of protecting the welfare of her child and tended to establish that mother manifested indifference to the well-being of her son.

Proving the Identity of the Perpetrator by Clear and Convincing Evidence

The South Carolina Supreme Court has reversed convictions on the grounds that the state failed to prove by clear and convincing evidence that the defendant was the one to inflict the prior injuries. In *State v. Pierce*, 485 S.E.2d 913 (S.C. 1997), the court reversed a conviction of homicide by abuse because the lower court allowed hospital employees to testify the victim had previously been treated for a "split lip" and a swollen eye. Even though there was separate testimony that the child suffered numerous injuries and was a battered child, the court held that this evidence was admitted under a common scheme or plan theory and that since there was no evidence the defendant inflicted the prior injuries, admission of the evidence was error.

In this context, it is significant to note that the United States Supreme Court unanimously held that admission of evidence of battered child syndrome is relevant even if it does not identify the perpetrator. *Estelle v. McGuire*, 502 U.S. 62 (1991) (discussed below). Thus, to the extent that battered child

syndrome is involved, the U.S. Supreme Court has clearly stated such evidence is relevant even though there is little evidence to connect the defendant to the prior injuries.

The South Carolina Supreme Court has viewed evidence of prior acts of abuse skeptically when a second potential perpetrator is involved. In *State v. Cutro*, 504 S.E.2d 324 (S.C. 1998), the court reversed a day care operator's murder conviction on the grounds that the state failed to prove by clear and convincing evidence that she committed the prior acts. In *Cutro*, a four-month-old child died while in defendant's care. The prosecution's experts testified the child died from asphyxiation, while the defendant's experts claimed the child died from sudden infant death syndrome (SIDS). Three months prior to the victim's death, another child in the defendant's care suffered non-fatal injuries attributable to shaken baby syndrome. Eight months prior to the victim's death, a different child died while in the defendant's care. The prosecution's experts concluded this child died of asphyxiation; the defendant's experts concluded the child died of SIDS. The court in *Cutro* held that since the defendant's husband had access to the children, the state failed to prove the defendant had exclusive control of the children; therefore, the state failed to prove by clear and convincing evidence that the defendant committed the prior acts. *Id.* at 327. See also *State v. Fletcher*, 664 S.E.2d 480 (S.C. 2008) (no clear and convincing evidence to prove defendant placed child in attic or handcuffed child).

B. Alternative Theories for Admitting Prior Acts of Physical Abuse

When the identity of the perpetrator cannot be established by clear and convincing evidence, *Lyle* exceptions other than the common scheme or plan exception should be considered. Four closely related alternatives are considered below, all of which revolve around disproving that previous injuries to a child are mere coincidence.

Res Gestae

In *State v. Adams*, 470 S.E.2d 366 (S.C. 1996), appellant was convicted of murder and armed robbery. On appeal, his arguments included that the trial court erred in admitting evidence of prior bad acts (participation in another armed robbery and prior cocaine use). The evidence concerning cocaine use was that appellant used cocaine on the morning of the day of the armed robbery for which he was convicted. The court held that the evidence of appellant's use of cocaine immediately prior to the robbery was properly admitted as *res gestae* of the crimes for which he was tried. The court cited *United States v. Masters*, 622 F.2d 83, 86 (4th Cir. 1980) for a useful analysis of *res gestae*. See also *State v. Wiles*, 679 S.E.2d 172 (S.C. 2009)(evidence of escape from prison one week before commission of ABHAN and failure to stop for blue light for which petitioner was convicted was admissible as logically relevant to motive and intent and as *res gestae* in that evidence showed the first link in the chain of circumstance leading to the criminal charges).

One of the accepted bases for admissibility of evidence of other crimes arise when such evidence “furnishes part of the context of the crime” or is necessary to a “full presentation” of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its “environment” that its proof is appropriate in order “to complete the story of the crime on trial by proving its immediate context or the “*res gestae*” or the “uncharged offense” is ‘so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ... ‘[and is thus] part of the *res gestae* of the crime charged.’” Where evidence is admissible to provide this “full presentation” of the offense, “there is no reason to fragmentize the event under inquiry” by suppressing parts of the “*res gestae*.”

In *State v. Martucci*, 669 S.E.2d 598 (S.C. Ct. App. 2008), the trial court admitted testimony about appellant's prior abuse of the child and photographs showing external bruising on the child several weeks before his death. The court of appeals held the evidence was admissible on a number of grounds including that the prior acts may be considered as *res gestae*. While noting that the prior incidents were neither factually nor temporally related to the charged crime, the court nonetheless reasoned: “In this case, the time period and similarity of the incidents involved must be examined overall because of the nature of the crime charged. The overall view of the facts provides that context on which the crime occurred and demonstrates the culminating impact on the child. The incidents were relevant to establishing [appellant's] state of mind and whether or not he manifested an extreme indifference to human life. . . . The testimony regarding the prior bad acts was relevant to show the complete, whole story relating to the charge of homicide by child abuse.”

In cases of child physical abuse and child homicide, *Adams* and *Wiles* provide a method of analysis for admitting evidence of prior acts. When the prior acts help show the “complete, whole, unfragmented story,” solicitors should consider arguing for admission under the *res gestae* exception. Whether the

court of appeals analysis in *Martucci* will withstand supreme court scrutiny is an open question given the different approaches each court has taken in cases involving homicide by child abuse.

Solicitors should also consider arguing the analysis in Chief Justice Toal's dissent in *State v. Fletcher*, 664 S.E.2d 480 (S.C. 2008). Chief Justice Toal notes that child abuse differs from other crimes in several respects, including that it often occurs in secret, in the privacy of a home. She notes that the abuse is not usually confined to a single instance but is a systematic pattern of violence. She points out that the General Assembly has drafted the homicide by child abuse statute to address both the act that causes the death of a child and a course of conduct which results in the death of a child. In that regard, she criticizes the majority opinion:

In my opinion, the majority's view of prior bad acts in the instant case as it relates to the crime of homicide by child abuse is far too narrow. Because the statute specifically prohibits not just acts resulting in deaths but also omissions, I believe it is irrelevant whether Petitioner was the one to actually handcuff the infant victim to the bed and to place him in the attic, or whether he was aware of the abusive incidents that occurred in his home and failed to act to protect the child from abuse. . . . Considering the evidence presented in this case, I would hold the friend's testimony was admissible under the res gestae doctrine. I believe the testimony showed a course of conduct and established an integral part of the crime of homicide by child abuse because it is evidence that Petitioner abused and neglected the victim just weeks before his death.

664 S.E.2d at 485.

Intent/Lack of Mistake or Accident

Prior acts are admissible as evidence of the defendant's intent. See Myers, *Myers on Evidence of Interpersonal Violence*, § 8.06, at 933 – 950 (5th ed. 2011). Establishing the identity of the perpetrator has been an obstacle to admission of prior acts to prove intent in a number of reported South Carolina cases. See discussion of *Pierce*, *Cutro* and *Fletcher* above. Prosecutors should note the discussion in Myers and the dissent's argument in *Pierce* that evidence of the defendant's prior acts of physical abuse upon the child homicide victim should have been admissible under the lack of mistake or accident exception. Citing the U.S. Supreme Court case *Estelle v. McGuire*, 502 U.S. 62 (1991), the dissent in *Pierce* argued:

Appellant's defense — that [the victim] had accidentally hurt himself while running through the house — is very similar to that used in *Estelle*. Whether the alleged accident arises from the defendant's actions or the child's, the result should be the same. If the defendant seeks to avail himself of the defense of accident, such defense may be negated.

State v. Pierce, 485 S.E.2d 913, 917, n4 (S.C. 1997).

In *State v. Smith*, 705 S.E.2d 491 (S.C. Ct. App. 2011), defendant was convicted for aiding and abetting homicide by child abuse against his four year old daughter. Evidence showed that the child died on February 14, 2004, from an overdose of pseudoephedrine (four times the adult therapeutic level) and

blunt force trauma to her chest (the child had seventeen broken ribs at the time of her death) . Defendant was the live-in boyfriend of the child's mother and the evidence demonstrated that defendant was the child's primary caretaker and was around the child on a constant basis. The State introduced evidence of a spiral fracture of the child's femur and further proved that defendant inflicted that injury on the child in November 2003. The court of appeals found the evidence clear and convincing that defendant inflicted the femur injury on the child and found that the evidence was properly admitted to show defendant's motive and the absence of mistake or accident. As the court of appeals explained, "The child would have been crying continually and extensively because of [the injury to her femur] and progressing with the subsequent injuries. In light of the testimony that Appellant could not 'handle' the victim's crying, the femur injury was highly relevant to show Appellant's motive for ... attempting to 'chemically restrain' the child with medicine. The femur evidence was thus critical to show that the overdose was not purely a mistake or accident." *Id.* at 496 – 497.

The Doctrine of Chances

Many cases analyzing the absence of mistake or accident exception do so under the rubric of the doctrine of chances. The doctrine of chances asserts that the probability that an unusual act is an accident is made less probable each time the unusual act has happened previously. As explained by Wigmore in a discussion using an allegedly accidental shooting as a hypothetical:

[B]ecause the chances of an inadvertent shooting on three successive similar occasions are extremely small; or (to put it in another way) because inadvertence or accident is only an abnormal or occasional explanation for the discharge of a gun at a given object, and therefore the recurrence of a similar result . . . (here in the shape of an unlawful act) tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act; and the force of each additional instance will vary in each kind of offense according to the probability that the act could be repeated, within a limited time and under given circumstances, with an innocent intent.

John H. Wigmore, *Evidence in Trials at Common Law* § 242, at 45 (Chadbourn rev. ed. 1979) (quoted in Myers, *Myers on Evidence of Interpersonal Violence* § 8.06(B), at 934 – 937(5th ed. 2011)).

Because defenses to child homicide charges often are based on accident — a child's death was caused by a fall, SIDS, or other unintentional or unknown force — the doctrine of chances is especially pertinent. The doctrine has been widely accepted across the United States in the context of child abuse. *See Id.*, § 8.06(B), at 935 – 936.

Significantly, the doctrine of chances does not require proof of the identity of the person who committed the prior uncharged acts. Because the purpose of the doctrine is to rebut a claim of accident, the doctrine of chances allows admission of evidence to tend to show that, regardless of the identity of the perpetrator, the act at issue was not the result of an accident. For example, a single unexplained death of a child in the care of a day care operator is a mystery. A second death within a period of a few months logically raises

questions as to the likelihood of such a death being an accident. A third death makes accident an even less likely explanation. To counter a defense of unintentional or accidental injury, then, the doctrine of chances provides a long-standing legal theory for prosecutors to argue.

A landmark Fourth Circuit decision provides persuasive precedent for admitting other act evidence for inexplicable deaths of multiple children. In *United States v. Woods*, 484 F.2d 127 (4th Cir. 1973), the defendant was convicted of murder, attempted murder, and assault charges for the death and injuries she inflicted upon her eight-month-old foster son. The state produced evidence that the defendant had access to nine children over the course of nearly 30 years, that seven of these children died and others had medical problems while in her care. Three of the children were her biological children, two were adopted, one was a niece, one a nephew, and two were children of friends. In an often quoted passage, the court stated:

[W]ith regard to no single child was there any legally sufficient proof that defendant had done any act which the law forbids. Only when all of the evidence concerning the nine other children and Paul [victim] is considered collectively is the conclusion impelled that the probability that some or all of the other deaths, cyanotic seizures, and respiratory deficiencies were accidental or attributable to natural causes was so remote, the truth must be that Paul and some or all of the other children died at the hands of the defendant. We think also that when the crime is one of infanticide or child abuse, evidence of repeated incidents is especially relevant because it may be the only evidence to prove the crime. A child of the age of Paul and of the others about whom evidence was received is a helpless, defenseless unit of human life. Such a child is too young, if he survives, to relate the facts concerning the attempt on his life, and too young, if he does not survive, to have exerted enough resistance that the marks of his cause of death will survive him. Absent the fortuitous presence of an eyewitness, infanticide or child abuse by suffocation would largely go unpunished.

484 F.2d at 133. The court went on to examine the law of other act evidence and hold the other act evidence admissible. *See also* Myers, *Myers on Evidence of Interpersonal Violence*, § 8.06(B), at 937 n.131 (5th ed. 2011) (listing jurisdictions adopting this theory to rebut a claim of accidental injury).

Battered Child Syndrome

Another argument that goes hand-in-hand with the lack of mistake or accident exception is evidence of battered child syndrome. Battered child syndrome has been recognized since the early 1960s as a condition of children who are repeatedly abused. When a physician diagnoses a child as suffering from battered child syndrome, the diagnosis by definition indicates the physician's opinion that the injuries were intentionally inflicted and were not accidental. For a definition of battered child syndrome, *see Taber's Cyclopedic Medical Dictionary* 207 (18th ed. 1997). The diagnosis also necessarily relies on

prior acts and thus, if challenged on these grounds, the rules of evidence must provide for the admissibility of testimony as to the prior acts.

The U.S. Supreme Court case *Estelle v. McGuire*, 502 U.S. 62 (1991), directly addressed the issues raised by the introduction of such evidence. In a federal habeas corpus appeal, the defendant argued that evidence of battered child syndrome was not relevant and therefore admission of such evidence violated the Due Process Clause of the Constitution. The Court held that such evidence was, in fact, relevant and therefore the court did not address the constitutional issue.

The Court in *Estelle* first explained why battered child syndrome evidence is relevant:

[E]vidence demonstrating battered child syndrome helps to prove that the child died at the hands of another and not by falling off a couch, for example; it also tends to establish that the ‘other,’ whoever it may be, inflicted the injuries intentionally. When offered to show that certain injuries are a product of child abuse, rather than accident, evidence of prior injuries is relevant even though it does not purport to prove the identity of the person who might have inflicted those injuries.

502 U.S. at 68.

The Court found that, since the prosecution was required to prove an intentional act, evidence of battered child syndrome was relevant to prove intent even though the state did not prove the identity of the person who inflicted the prior injuries. The Court also rejected the argument that accident must be alleged by the defense before battered child syndrome evidence is admissible. Because the prosecution is required to prove intent as an element of its case in chief, the Court held such evidence was relevant to help prove an intentional, rather than accidental, act occurred. 502 U.S. at 68.

In *State v. Lopez*, 412 S.E.2d 390, 393 (S.C. 1991), the court recognized battered child syndrome as an accepted medical diagnosis, but did not address the issue of prior acts. When *Lopez* is considered in conjunction with the reasoning of *Estelle* — as explained by the dissent in *Pierce* — it is reasonable to assert that evidence of prior abuse should be admissible in the context of evidence on battered child syndrome. However, prosecutors must recognize that *Pierce*, *Cutro* and *Fletcher* demonstrate that proving the identity of the perpetrator may be problematical even in cases of battered child syndrome.

C. Sexual Abuse Case Law

Common Scheme or Plan

The most frequently accepted avenue for admitting evidence of prior sexual abuse is the common scheme or plan exception. Since at least 1911, South Carolina courts have consistently applied the common scheme or plan exception to sex crimes. *See State v. Richey*, 70 S.E. 729 (S.C. 1911); *State v. McClellan*, 323 S.E.2d 772 (S.C. 1984); *see also State v. Clasby*, 682 S.E.2d 892 (S.C. 2009)(prior bad acts involving defendant and victim which occurred prior to indicted offenses admitted as common scheme or plan);

State v. Gaines, 667 S.E.2d 728 (S.C. 2008)(criminal solicitation of minor by internet charged and other acts involving another young female child victim admitted as common scheme or plan).

An example of common scheme or plan is the pre-*Wallace* case of *State v. Weaverling*, 523 S.E.2d 787 (S.C. Ct. App. 1999), where the defendant was convicted on three counts of CSC with a minor. The victim testified at trial that the defendant engaged in more than one hundred sex acts with him, and the court found that testimony about these prior uncharged acts was admissible as evidence of a common scheme or plan. Specifically, the evidence about the charged acts showed:

(1) Weaverling initiated the sexual contact by pulling down Doe's [the victim's] pants or shorts; (2) he obtained sexual gratification by having the child review pornography; (3) beginning when Doe was seven or eight years old, almost every time they saw one another, Weaverling would get Doe alone, pull down Doe's pants, and perform oral sex on Doe; and (4) Weaverling would have Doe look at a pornographic magazine or movie during the sexual assaults.

523 S.E.2d at 792. The evidence about the prior uncharged acts showed the same pattern of conduct with each sexual assault over a period of years. The court found the pattern of sexual abuse suffered by the victim to be "quintessential common scheme or plan evidence." *Id.* at 791. *See also State v. Kirton*, 671 S.E.2d 107 (S.C. Ct. App. 2008)(sex offenses against same victim several years earlier admissible as constituting a common scheme or plan).

In *State v. Wallace*, 683 S.E.2d 275 (S.C. 2009), the court set forth a method for analyzing whether a prior bad act meets the common scheme or plan exception in the context of a child sex abuse case. The court of appeals had reversed the trial court which allowed the testimony of the victim's sister's testimony as evidence of common scheme or plan. *See State v. Wallace*, 611 S.E.2d 332 (S.C. Ct. App. 2005). The court of appeals determined that the trial court did not address any connection between the charged crimes and the prior bad acts. The supreme court reversed the court of appeals and noted that the issue is not connection between the acts but factual similarity between charged acts and the prior bad acts.

The supreme court noted that the analysis concerning admissibility of prior bad act evidence begins with a Rule 401, SCRE, determination of whether the evidence is relevant (relevant evidence is evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence). Upon determining that a prior bad act is relevant, the next step in the analysis is determining if the prior bad act fits within an exception set forth in Rule 404(b), SCRE. In *Wallace*, the prior bad acts evidence involving the victim's older sister was offered under the common scheme or plan. The supreme court determined that the prior bad acts evidence met the common scheme or plan exception and stated:

Rule 404(b) allows the admission of evidence of a common scheme or plan. Such evidence is relevant because proof of one is strong proof of the other. When determining whether evidence is admissible as common scheme or plan, the court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity. *State v. Parker*, 315 S.C. 230, 433 S.E.2d 831 (1993). When the similarities outweigh the dissimilarities, the bad act evidence is admissible.

683 S.E.2d at 277-78.

The court set forth a non-exclusive list of factors a trial court may consider in determining whether there is a close degree of factual similarity between the prior bad act and the crime charged including: the age of the victims when the abuse occurred; the relationship between the abuser and the victims; the location where the abuse occurred; the use of coercion or threats; and the manner of occurrence (for example, the type of sexual battery).

In footnote 5 of its opinion, the supreme court rejected the court of appeals' reliance on *State v. Tutton*, 580 S.E.2d 186 (S.C. Ct. App. 2003) which, according to the supreme court, appeared to require a connection beyond a degree of similarity in the details of the crime charged and the bad act evidence. *Wallace*, 683 S.E.2d n. 5 at 278.

Relying on the analysis set forth in *Wallace*, the supreme court reversed the court of appeals in *State v. Hubner*, 683 S.E.2d 279 (S.C. 2009). The lower court's decision found admission of prior bad acts was error when those prior bad acts occurred in a church setting with a similarly aged victim but occurred fourteen years earlier, with a different victim, and in a different state.

Interestingly, the court, relying on *Wallace*, affirmed the court of appeals decision in *State v. Fonseca*, 681 S.E.2d 1 (S.C. Ct. App. 2009) wherein the court of appeals reversed the trial court's admission of prior act evidence as evidence common scheme or plan. See *State v. Fonseca*, 711 S.E.2d 906 (S.C. 2011). The supreme court's decision affirming the court of appeals is three sentences long and says the court of appeals anticipated its *Wallace* decision. Chief Justice Toal, in dissent, however, notes, "The two instances of sexual battery in this case involved the same victim, occurred at Respondent's home when the victim was helping her sister, occurred after Respondent followed victim into another room where he could be alone with her, and involved similar acts of touching the victim's genital area in a sexual manner." *Fonseca*, 711 S.E.2d 906 at 907. The supreme court's tersely affirming the court of appeals in *Fonseca* citing *Wallace* contrasts with its equally terse decision (four sentences) in *State v. Hubner*, 683 S.E.2d 279 (S.C. 2009) which, as set forth above, reversed the court of appeals and, citing *Wallace*, allowed prior act evidence of a different victim, in a different state, and that occurred fourteen years earlier.

Absent an analysis from the supreme court concerning how *Wallace* supports admission of other acts evidence in cases such as *Hubner* but does not in cases such as *Fonseca*, application of the method of analysis for prior bad act evidence set forth in *Wallace* may be problematical.

Cases Accepting a Common Scheme or Plan Argument

Supreme Court

State v. Wallace, 683 S.E.2d 275 (S.C. 2009). Defendant convicted of CSC 2d with a minor (his stepdaughter). Evidence of prior bad acts with victim's sister admissible as common scheme or plan evidence. Factual similarities between charged crime and prior bad acts included: victims were both stepdaughters; abuse began at about the same age; abuse occurred in the family home when mother was absent; and both victims were admonished not to tell because no one would believe it.

State v. Clasby, 682 S.E.2d 892 (S.C. 2009). Defendant convicted for lewd act upon a child (her daughter). Evidence of prior bad acts involving same child that occurred prior to charged act were admissible as common scheme or plan. Factual similarities between charged crime and prior bad acts include: same victim; acts occurred when defendant was reunited with victim; and each incident established a pattern of escalating abuse which culminated in digital penetration of victim.

State v. Gaines, 667 S.E.2d 728 (S.C. 2008). Defendant convicted of three counts of criminal solicitation of a minor. Evidence of prior chats with another child female victim were admissible to show common scheme or plan, intent and/or absence of mistake. In charged offenses and prior bad acts defendant: engaged in AOL chat room conversations with young females he believed to be 12 and 13; he informed both girls of his age and that it was illegal for him to date them; he proposed to both the idea of taking them to a motel room and expressed his desire that each come to live with him; he confirmed from each that she had not been intimate with anyone before; requested that each send photos of themselves; offered to buy them clothing and lingerie; and suggested similar acts for each to perform.

State v. Hallman, 379 S.E.2d 115 (S.C. 1989). Defendant molested his foster child when she was aged seven to nine years old. The abuse escalated from fondling to penetration and usually took place in a barn or while riding a tractor during the summer. The similarities of admissible prior acts included: the victims were foster children who were aged six to twelve and seven to thirteen; defendant engaged in similar acts in similar locations; the abuse happened during the summer.

State v. McClellan, 323 S.E.2d 772 (S.C. 1984). Testimony of two older daughters was admissible in CSC prosecution for acts committed against a younger daughter. The court found the following similarities: "the initial attack occurred around age twelve; appellant entered their room and chose one of them, who would be forced to submit; he gave to each the same explanation for his actions; and he quoted to each the Biblical verse [to honor thy father]."

Court of Appeals

State v. Kirton, 671 S.E.2d 107 (S.C. Ct. App. 2008). Appellant convicted of CSC 2d with a minor. On appeal, appellant alleged that the trial court erred in denying his motion to exclude evidence of prior bad acts. The victim was 12 or 13 at the time appellant committed the offense for which he was convicted. At trial, the victim testified that appellant began kissing her and committing other sexual acts with her when she was six or seven years of age. Appellant objected to the victim's testimony concerning the prior bad acts on the grounds that: the prior acts were not similar to the one charged; they were not proven by clear and convincing evidence; and testimony about them was unduly prejudicial. The court of appeals rejected appellant's arguments finding that the prior bad acts constituted a common scheme or plan: "All of [appellant's] alleged activity was directed toward the same victim. The six to seven year pattern of escalating abuse of Victim by [appellant] is the essence of grooming and continuous illicit activity. . . . While the prior sexual acts were not the same as the exact crime for which [appellant] was charged, Victim detailed a clear pattern of escalating sexual abuse and not a few isolated, unrelated incidents."

State v. Edwards, 644 S.E.2d 66 (S.C. Ct. App. 2007). Defendant convicted of three counts of criminal sexual conduct with a minor. The victim testified about defendant's prior assaults which began with touching, removal of victim's clothes and sexual intercourse and occurred when the victim's mother was at work. Defendant also told victim not to tell and offered to buy her things if she did not tell. Court, citing *State v. Mathis*, found the prior bad acts admissible as they constituted continued illicit intercourse between the same parties.

State v. Mathis, 597 S.E.2d 872 (S.C. Ct. App. 2004). The court identified the following similarities: "On each occasion, Mathis approached the victim while she was alone at family gatherings. He would touch her in largely the same suggestive, inappropriate manner each time, and he would then attempt to entice her to have sex with him. During at least two of the three prior incidents, Mathis accompanied his improper advances with offers of gifts — just as he did during the incident for which he is charged." *Id.* at 880.

State v. Weaverling, 523 S.E.2d 787 (S.C. Ct. App. 1999). The defendant was convicted on three counts of CSC with a minor. The victim testified at trial that the defendant engaged in more than one hundred sex acts with him, and the court found that testimony about these prior uncharged acts was admissible as evidence of a common scheme or plan.

Court of Appeals (continued)

State v. Adams, 504 S.E.2d 124 (S.C. Ct. App. 1998). The court listed the following similarities: "Adams used his relationship as stepfather to control the girls; the girls were approximately the same age; the attacks began in the back-yard hammock; both girls were molested in Adams's truck; both girls were forced to place their hands on Adams's genitals while in his truck; Adams picked locks to both girls' bedrooms to watch them change clothes; Adams entered the bathroom while both girls were showering and pulled the shower curtain aside while they were bathing; Adams offered to show both girls a pornographic videotape; Adams repeatedly asked both girls when they could have sex; and, to control both girls from disclosing his abuse, Adams threatened both girls with the same line: 'If you tell, you'll go down with me.'" *Id.* at 126.

State v. Luckabaugh, 489 S.E.2d 657 (S.C. Ct. App. 1997). The court upheld admission of defendant's possession of unique drugs and medical instruments as relevant since it increased the probability that his intent was sexual under the unusual facts of this case.

State v. Blanton, 446 S.E.2d 438 (S.C. Ct. App. 1994). Defendant molested his eight-year-old granddaughter. Other acts against different victims occurring seven to eight years earlier were found to be sufficiently similar. All victims were about the same age, the acts involved cunnilingus and fellatio, the acts took place in defendant's house or vehicle, and each victim was in a relationship with defendant that allowed him to take advantage of them.

State v. Henry, 432 S.E.2d 489 (S.C. Ct. App. 1993). Testimony of prior victim was admissible in prosecution for crimes against her sister. The acts occurred in the same places during the same time period; the defendant showed each victim pornographic movies and offered each money; he touched each in a sexually offensive manner; and he threatened punishment if each did not engage in the acts. Testimony of a younger sister was inadmissible because the acts were not so related to each other that proof of the one tended to establish proof of the other.

State v. Wingo, 403 S.E.2d 322, 324-25 (S.C. Ct. App. 1991). Both victims were 12-year-old girls; defendant took victims to his home for the purported purpose of helping him clean it; he played pornographic movies and gave the victims alcohol and drugs; had the victims bathe naked in his jacuzzi; defendant performed cunnilingus on the girls and either had or attempted intercourse; defendant threatened to kill a parent if they told anyone.

Following the supreme court opinions in *Wallace*, *Hubner* and *Fonseca*, solicitors seeking to have prior bad act evidence admitted should continue to identify and present evidence concerning the factual similarities between the charged act(s) and the prior bad act(s). Those factual similarities may include the similarities enumerated in *Wallace* as well as grooming and luring behaviors and other factual circumstances of the assaults.

Cases Rejecting a Common Scheme or Plan Argument

Supreme Court

State v. Nelson, 501 S.E.2d 716 (S.C. 1998). The defendant was convicted of multiple sexual offenses for acts committed upon a three-year-old child. The state introduced videotaped children's television shows, toys, pictures of young girls in various states of dress, and a picture of Punkey Brewster. The prosecution also introduced expert testimony that possession of such objects was consistent with the condition of pedophilia. The court found the evidence to be improper character evidence, the only purpose of which was to show that the defendant was a pedophile, thereby encouraging the jury to conclude based on his character that he must have committed the acts charged.

State v. Rogers, 362 S.E.2d 7 (S.C. 1987), *overruled on other grounds*, *State v. Schumpert*, 435 S.E.2d 59 (S.C. 1993). Testimony that defendant touched child ten years previously was not sufficient to find a common scheme or plan.

Court of Appeals

State v. Fonseca, 681 S.E.2d 1 (S.C. Ct. App. 2009), *aff'd*, 711 S.E.2d 906 (S.C. 2011). Defendant was convicted of one count of lewd act upon a child. Trial court admitted evidence of prior assault (two years prior) as showing defendant's intent but rejected State's argument that prior act showed common plan or scheme. Court of appeals, following *Nelson*, reversed and remanded on the grounds that neither motive nor intent were relevant issues at trial because defendant denied any contact with victim. Court of appeals also found "no compelling argument of any similarities between the charged assault and the uncharged assault on the victim (charged assault: pushed child victim down and rubbed himself in a sexual manner against her; uncharged assault: defendant lay beside the victim in bed and touched beneath her underwear, rubbing her vagina and exposing his penis).

State v. Tutton, 580 S.E.2d 186 (S.C. Ct. App. 2003). A 12-year-old victim testified that the defendant sexually assaulted her several years prior to the assault at issue in the trial. The court emphasized the following dissimilarities: the uncharged acts were more serious (cunnilingus and fellatio as opposed to digital penetration); there were threats made after the uncharged assault, but not after the charged assaults; and the defendant did not attempt to assault other girls at the time of the uncharged assault. NOTE: as noted above, the rationale of *Tutton* was questioned in *State v. Wallace*, 683 S.E.2d 275 (S.C. 2009).

State v. Henry, 432 S.E.2d 489 (S.C. Ct. App. 1993). Evidence of acts against of one sister was admissible; testimony of a younger sister was held inadmissible because the acts were not so related to each other that proof of the one tended to establish proof of the other.

State v. Atkins, 424 S.E.2d 554 (S.C. Ct. App. 1992). Admission of defendant's confession to a prior sexual crime was reversible error as its sole purpose was to show defendant had a propensity to sexually abuse children.

Motive or Intent

The language used in some appellate court decisions make introduction of other acts to prove sexual intent or motive a difficult task. The court in *Nelson* took the opportunity to reject the use of the “motive or intent” exception. The court held that, since defendant disputed that any contact occurred, his sexual intent was irrelevant. *State v. Nelson*, 501 S.E.2d 716 (S.C. 1998); *see also State v. Fonseca*, 681 S.E.2d 1 (S.C. Ct. App. 2009), *aff’d*, 711 S.E.2d 906 (S.C. 2011)(appellant denied any contact occurred so intent was not a material issue).

Under different facts, however, a “motive or intent” exception may be applicable. A motive or intent exception should be available when the defendant denies acting with sexual intent. *Nelson* indicated that when sexual intent is an element and the defendant categorically denies the act, then evidence of his sexual intent is irrelevant. In a case in which defendant’s sexual intent must be proven and a defendant denies acting with sexual intent, the *Nelson* opinion may leave open the option of presenting prior acts to show the defendant possesses the requisite sexual intent. For example, a defendant who claims a touching was done with a non-sexual intent (e.g. “wrestling” with a child) may open the door to evidence of his prior sexual abuse of children. Such evidence should be relevant to show that he is sexually attracted to children. Many courts hold such evidence admissible during the prosecution’s case-in-chief since the prosecution must prove the element of sexual intent, but it is far from certain the South Carolina Supreme Court would agree. *See Myers, Myers on Evidence of Interpersonal Violence*, § 8.06(C), at 940 – 947 (5th ed. 2011).

It is also important to factually distinguish *Nelson*, which involved the admission of lawful written materials as evidence of the defendant’s sexual intent. It is possible the court would view prior illegal acts against children differently than it viewed possession of tangible objects that were not in themselves illegal.

Consciousness of Guilt

Witness Intimidation

In *State v. Edwards*, 644 S.E.2d 66 (S.C. Ct. App. 2007), *aff’d as modified*, 678 S.E.2d 405 (S.C. 2009), the trial court allowed the child victim’s mother to testify that the defendant told mother “To get in touch with [the child victim] and have her not show up because had had a hit on her, [and] she wouldn’t make it through the courtroom doors.” Mother also testified that defendant told mother that, if he went to jail on the charges, he would have the victim killed or kill the victim when he got out. The trial court allowed the mother’s testimony as witness intimidation testimony and the court of appeals affirmed the conviction. The supreme court affirmed but modified the court of appeals’ decision. In the view of the supreme court, the mother’s testimony was witness intimidation evidence which is admissible to prove consciousness of guilt and criminal intent under SCRE 404(b) when the evidence is related to the offense charged and is reliable. *See also Myers, Myers on Evidence of Interpersonal Violence*, § 8.09, at 962 – 963 (5th ed. 2011).

Suicide Attempt

Defendant in *State v. Orozco*, 708 S.E.2d 227 (S.C. Ct. App. 2011) was convicted of two counts of criminal sexual conduct with a minor and two counts of a lewd act upon a child. The State presented evidence of defendant's suicide attempt as evidence of consciousness of guilt. Noting that whether evidence of attempted suicide is probative of a defendant's consciousness of guilt is an issue of first impression in South Carolina, the court held such evidence was generally admissible for whatever value the jury decides to give it.

D. General Issues Related to *Lyle* Evidence

Bad Character

A core reason for excluding evidence of prior bad acts is that the prior act is used simply to impugn a defendant's character. While evidence that solely paints a defendant as a sexual deviant is impermissible, evidence that is relevant on other grounds is not necessarily inadmissible simply because a jury could infer bad character from the evidence.

For example, in *State v. Tufts*, 585 S.E.2d 523 (S.C. Ct. App. 2003), defendant told an investigator that "he knew he had a problem with his sexual desires." *Id.* at 524. He argued that admission of this statement constituted inadmissible *Lyle* evidence. The court of appeals disagreed, holding that his statements were not admitted to show his bad character, but as part of a confession to the specific crime charged.

The defendant made a similar argument in *State v. Richardson*, 595 S.E.2d 858 (S.C. Ct. App. 2004). The defendant had used religion and financial pressures to coerce two daughters of a pastor to engage in sexual activity. The defendant told the victims that he represented a foundation that helped churches acquire grants and other financial assistance (defendant had a pending charge of obtaining goods under false pretenses related to this foundation). During cross-examination, the solicitor asked defendant questions about the foundation and whether he considered himself to be a "man of God." The court held that the questioning did not attack his character, nor could it be construed as improper use of prior bad acts. Rather, the court held that both lines of inquiry were relevant to substantiate the victims' claims of religious and financial pressure. *Id.* at 863.

Proof by Clear and Convincing Evidence

The state must prove the factual occurrence of the prior act by clear and convincing evidence. *State v. Bell*, 393 S.E.2d 364, 369 (S.C. 1990). An arrest or conviction for the prior crime is not necessary. *See State v. McClellan*, 323 S.E.2d 772 (S.C. 1984); *State v. Blanton*, 446 S.E.2d 438, 440 n.5&6 (S.C. Ct. App. 1994).

Unfair Prejudice

Although not involving child abuse, *State v. Gillian*, 646 S.E.2d 872 (S.C. 2007), provides a useful discussion of the principle that, although bad acts evidence may be admissible to prove identity, such evidence may be excluded because its prejudicial effect substantially outweighs its probative value. In *Gillian*, appellant was convicted of murder. The murder weapon was never found and murder victim was found behind jewelry store which appellant had burglarized prior to the murder. On appeal, appellant argued that the trial court erred in admitting evidence of appellant's burglary of a jewelry store to establish identity. Court found that evidence of a prior burglary of a jewelry store was admissible to establish that appellant was knowledgeable of the murder location. The court held that appellant was subjected to undue prejudice, however, by the amount of evidence admitted concerning the burglary and not necessary to prove the murder. Error was harmless in view of other evidence which established guilt beyond reasonable doubt.

Lapse of Time Between the Prior and Charged Acts

There is no specific time requirement between the prior acts and the charged acts. In *State v. Blanton*, 446 S.E.2d 438 (S.C. Ct. App. 1994), the court of appeals found that acts seven to eight years prior were not too remote in time, and noted that a seven year delay did not preclude admission in *State v. Hallman*, 379 S.E.2d 115 (S.C. 1989). In contrast, the court held acts ten years prior to be dissimilar and too remote. *State v. Rogers*, 362 S.E.2d 7 (S.C. 1987), *overruled on other grounds*, *State v. Schumpert*, 435 S.E.2d 59 (S.C. 1993). The *Blanton* court did not cite or attempt to distinguish *Rogers*. See also *State v. Hubner*, 683 S.E.2d 279 (S.C. 2009) (prior evidence admissible after fourteen year time span); *Bryson v. State*, 437 S.E.2d 352 (Ga. Ct. App. 1993) (while not giving the exact time frame, the court indicated the prior acts occurred a generation earlier but within 31 years of the offenses for which defendant was on trial).

Direct Appeal

A trial court's suppression of other act evidence in a child sexual abuse prosecution can "significantly impair" the prosecution and therefore be directly appealed by the state under S.C. Code Ann. § 14-3-330(2)(a). *State v. Henry*, 432 S.E.2d 489 (S.C. Ct. App. 1993).

Prior Acts Admissible Because Defense Opens the Door

When defense counsel continuously questioned the victim about defendant's sexual abuse of the victim's sister, it was not error for the prosecution to "exploit" this information. *State v. Warren*, 534 S.E.2d 687 (S.C. 2000). The court stated: "The fundamental problem with this case is that the 'bad act' evidence was not presented by the State as substantive evidence of guilt, nor was it introduced by the State in an attempt to impeach respondent's character. Instead, it was introduced largely through the questioning conducted by respondent's attorney." 534 S.E.2d at 688. See also *State v. Culbreath*, 659 S.E.2d 268 (S.C. Ct. App. 2008)(defense opened door to testimony of prior drug dealings by questioning witness about prior transactions between witness and defendant); but see *State v. Young*, 661 S.E.2d 387 (S.C.

2008)(defendant's testimony that he hated to see women cry did not open the door for admission of prior CDV and CSC convictions but court found error harmless).

Acts of Others Sought to be Introduced by the Defense

In cases of co-defendants, one defendant may attempt to introduce the acts of the other co-defendant. For example, in *State v. Cope*, 684 S.E.2d 177 (S.C. Ct. App. 2009), appellant was convicted of murder, two counts of CSC 1st, criminal conspiracy and unlawful conduct toward child. Appellant argued that trial court erred denying his request to admit evidence of four other sexual assaults committed by his co-defendant (Sanders). In agreeing with trial court's decision, court of appeals found that, while there were similarities among the crimes, there were many differences, including that none of the other crimes involved a child victim.

Prior Bad Acts to Impeach

A defendant who testifies may be asked about prior bad acts which affect his credibility. *State v. Outlaw*, 414 S.E.2d 147 (S.C. 1992). If the defendant denies the prior act, however, it may not be proved by extrinsic evidence unless the prior act resulted in a conviction. See *State v. Taylor*, 508 S.E.2d 870 (S.C. 1998) (defendant opened the door to being questioned about prior domestic violence conviction by implying during his testimony that he and his wife had a good relationship until recent years).

When a defendant offers evidence of his good character regarding traits relevant to the crime, the prosecution may cross-examine the witness as to specific bad acts or conduct of the defendant. However, the impeachment must be limited to the character trait put into evidence by defendant. *State v. Reeves*, 391 S.E.2d 241 (S.C. 1990). In *Reeves*, defendant was convicted of committing a lewd act upon a minor and disseminating sexually oriented material to a minor. Defendant offered character witnesses to testify as to his good behavior with children. The state sought to cross-examine him about a rape 19 years earlier for which defendant had been arrested (and subsequently dismissed on the same day as the arrest). The court held that the arrest did not rise to the level of a "bad act," being "merely evidence of an arrest." Attempted impeachment based on the arrest was prejudicial error.

Subsequent Bad Acts

South Carolina courts apply *Lyle* to acts occurring both before and after the acts charged. *State v. Stokes*, 673 S.E.2d 434 (S.C. 2009)(subsequent bad acts evidence admissible where it linked gun to charged crime of burglary) *State v. Patrick*, 457 S.E.2d 632, 635 (S.C. Ct. App. 1995); *State v. Atkins*, 424 S.E.2d 554 (S.C. Ct. App. 1992). Specifically in cases of sexual abuse, precedent clearly establishes that acts occurring both prior and subsequent to the charged acts are admissible to establish a common scheme or plan. See *State v. McClellan*, 323 S.E.2d 772 (S.C. 1984); *State v. Whitener*, 89 S.E.2d 701 (S.C. 1955); *State v. Richey*, 70 S.E. 729 (S.C. 1911).

Reference to Sexually Oriented Materials

Admission of testimony concerning sexually oriented materials seized in a search may be reversible error. In *State v. Johnson*, 512 S.E.2d 795 (S.C. 1999), the defendant was convicted of first degree CSC with a minor and lewd acts. At trial, the court allowed the arresting officer to testify about items seized in a search of the defendant's residence. The court also allowed the warrant itself to be admitted into evidence. Among the items seized were pornographic videotapes, condoms, handcuffs, and a vibrator. The court held that admission of the warrant and testimony as to the items seized was improper since the pornographic materials and sexual aids were irrelevant: "None of the victims claimed respondent photographed them, viewed pornographic material with them or used these sexual aids with them." *Id.* at 802.

While the court in *Johnson* was not addressing *Lyle* directly, the case serves as a reminder that the appellate courts will scrutinize reference to a defendant's possession of pornography or other sexually related materials. As in *Johnson*, the court may find the material simply irrelevant; likewise, the court may find admission of materials to constitute inappropriate use of character evidence. See *State v. Nelson*, 501 S.E.2d 716 (S.C. 1998). Before arguing for admission of such items, prosecutors should consider both *Johnson* and *Nelson*, and carefully articulate the relevance of the materials.

Table Four: Summary of *Lyle* Evidence in Sexual Assault Cases

Case	Victim's relationship to defendant	Admissibility	Lyle victim(s)
<i>Child Sexual Abuse</i>			
Supreme Court			
Wallace (2009)	Step-daughter	Admissible	Stepdaughter
Clasby (2009)	Daughter	Admissible	Same Victim
Hubner (2009)	Acquaintance	Admissible	Different Victim
Edwards (2009)	Step-daughter	Admissible	Same Victim
Nelson (1998)	Acquaintance	Inadmissible	None
Hallman (1989)	Foster family	Admissible	Other foster daughters
Rogers (1987)	Daughter	Inadmissible	Sister
McClellan (1984)	Intra-family	Admissible	Victim's sisters

Case	Victim's relationship to defendant	Admissibility	Lyle victim(s)
Court of Appeals			
Fonseca (2009)	Intra-family	Inadmissible	Same Victim
Edwards (2007)	Step-daughter	Admissible	Same Victim
Mathis (2004)	Niece	Admissible	Same victim
Tutton (2003)*	Acquaintance	Inadmissible	Same victim
Weaverling (1999)	Nephew	Admissible	Same victim
Adams (1998)	Intra-family	Admissible	Victim's sister
Luckabaugh (1997)	Adult hospital patient	Admissible	Other adult patient
Blanton (1994)	Intra-family	Admissible	Court does not indicate
Henry (1993)	Step-daughter	Admissible in part	Step sisters
Wingo (1991)	Acquaintance	Admissible	Other non-relative

Adult Sexual Assault

Court of Appeals			
Davenport (1996)	Acquaintance	Inadmissible	Acquaintance
Berry (1998)	Stranger	Inadmissible	Other victim

* The rationale of *Tutton* was questioned by the South Carolina Supreme Court in *State v. Wallace*, 683 S.E.2d 275 (S.C. 2009).

Table Five: Summary of Lyle Evidence in Physical Abuse Cases

Case	Victim's relationship to defendant	Admissibility	Lyle victim(s)
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Case	Victim's relationship to defendant	Admissibility	Lyle victim(s)
Supreme Court			
Holder (2009)	Son	Admissible	Same victim
Fletcher (2008)	Lived with mother	Inadmissible	Same victim
Northcutt (2007)	Intra-family	Inadmissible	Same victim
Cutro (1998)	Infant in child care	Inadmissible	Other children in child care facility
Pierce (1997)	Intra-family	Inadmissible	Same victim
Smith (1996)	Intra-family	Inadmissible	Other sibling
Court of Appeals			
Martucci (2008)	Lived with mother	Admissible	Same victim

E. Character Evidence Offered by the Accused

A defendant may offer evidence as to a “pertinent trait or character,” regardless of whether he testifies. *State v. Mizell*, 504 S.E.2d 338 (S.C. Ct. App. 1998) (interpreting Rule 404(a)(1), SCRE). What is “pertinent” at times is in dispute.

In *Mizell*, the defendant was convicted of lewd acts, first degree CSC with a minor, and second degree CSC with a minor. He did not testify at trial, but in response to a question from defense counsel, one of his character witnesses testified defendant “had never lied to her and she was not aware of any reputation that he was a liar.” The state objected to this line of questioning. The court of appeals agreed with the prosecutor, holding that truthfulness is a pertinent trait “only if it is involved in the offense charged.” Thus, the court upheld the trial court’s decision to exclude evidence as to the defendant’s truthful character.

F. Prior Convictions

Rule 609, SCRE, allows admission of evidence of prior convictions of a defendant so long as the court determines the probative value outweighs its prejudicial effect. Prosecutors must make sure the trial court articulates on the record its reasons for admitting such evidence. *See State v. Scriven*, 529 S.E.2d 71 (S.C. Ct. App. 2000) (finding the trial court erred in failing to articulate reasons for admitting prior drug

convictions in a drug case). *See also State v. Bryant*, 633 S.E.2d 152 (S.C. 2006)(court held admission of two previous firearms convictions was error as those convictions were not probative of truthfulness and admission of those prior convictions was more prejudicial than probative in defendant's trial for murder and unlawful possession of a weapon by a convicted felon).

In *State v. Bennett*, 632 S.E.2d 281 (S.C. 2006), the court held that it was not error to admit the testimony of the victims' mothers or to admit hospital photographs of the victims for prior ABHAN conviction during death penalty sentencing proceeding.

Rule 609 also places a 10 year time limit on introduction of evidence of a prior conviction. The ten years is counted from the time of conviction or the time of release from incarceration for the conviction, whichever is later. Convictions outside that time limit may be admitted only if the judge makes a finding supported by specific facts that the probative value of the conviction "substantially outweighs" its prejudicial effect. Rule 609(b), SCRE. *See State v. Cooper*, 687 S.E.2d 62 (S.C. Ct. App. 2009)(at trial where defendant was convicted of murder, kidnapping, armed robbery, forgery and conspiracy, prior convictions for housebreaking and larceny more than 10 years old were admitted for impeachment purposes because crimes were crimes of dishonesty).

V. Expert Testimony

The admissibility of expert testimony is determined by whether the proposed testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." Rule 702, SCRE. The supreme court has stated:

When admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable. . . . Further, if the evidence is admissible under Rule 702, SCRE, the trial judge should determine if its probative value is outweighed by its prejudicial effect. Rule 403, SCRE.

State v. Council, 515 S.E.2d 508, 518 (S.C. 1999).

To determine the reliability of the underlying science, courts are to apply the standards set forth in *State v. Jones*, 259 S.E.2d 120, 124 (S.C. 1979):

[T]he Court looks at several factors, including: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures.

State v. Council, 515 S.E.2d 508, 517 (S.C. 1999). *See also Watson v. Ford Motor Company*, 2010 WL 916109 (S.C. March 15, 2010)(court found purported expert's ideas about design were not reliable and

lacked any scientific basis, found admission of expert testimony prejudicial and reversed trial court's decision to admit the expert testimony); *State v. Jones*, 541 S.E.2d 813 (S.C. 2001) (excluding testimony about "barefoot insole impression" as not scientifically reliable).

In *State v. White*, 676 S.E.2d 684 (S.C. 2009), the court reaffirmed that non-scientific expert testimony (dog tracking evidence) must satisfy SCRE 702 in terms of expert qualifications and reliability of subject matter (overruling *State v. Morgan*, 485 S.E.2d 112 (S.C. Ct. App. 1997)). Appellant was convicted of armed robbery and kidnapping. Court of appeals affirmed conviction and rejected appellant's argument that dog tracking evidence was not properly admitted. Supreme court affirmed result but rejected the court of appeal's reliance on *State v. Morgan* and overruled *Morgan*.

The Supreme Court wrote, "We overrule *Morgan* to the extent it suggests that only scientific expert testimony must pass a threshold reliability determination by the trial court prior to its admission in evidence.... Nonscientific expert testimony must satisfy Rule 702, both in terms of expert qualifications and reliability of subject matter." 676 S.E.2d 684 at 688. While noting that it could not offer a formula by which to analyze nonscientific expert evidence, the court also set forth the requisites to establish a foundation for the admission of dog tracking evidence including: the evidence shows that the dog handler satisfies the qualifications of an expert under Rule 702; the evidence shows the dog is of a breed characterized by an acute power of scent; by experience, the dog is found to be reliable; the dog was placed on the trail where the suspect was known to have been within a reasonable time; and the trail was not otherwise contaminated. See *State v. Tapp*, 691 S.E.2d 165 (S.C. Ct. App. 2009) (court reversed and remanded for trial court determination whether crime scene witness non-scientific expert testimony was reliable under *State v. White*, 676 S.E.2d 684 (S.C. 2009)).

A. Specific Child Abuse Evidence Admissible

Battered Child Syndrome and Shaken Baby Syndrome

Testimony on battered child syndrome and shaken baby syndrome are admissible:

The finding of battered child syndrome and shaken baby syndrome is made based on a number of physical findings which are inconsistent with the history of the injuries given by the parents or caretakers. These syndromes have been developed as a result of extensive research and have become accepted medical diagnoses in other jurisdictions.

State v. Lopez, 412 S.E.2d 390, 393 (S.C. 1991). Testimony on these subjects is admissible "when given by a properly qualified expert and such testimony may support an inference that the child's injuries were not sustained by accidental means." *Id.* at 393.

It is important for the medical expert to clearly identify the condition of battered child syndrome. In *State v. Pierce*, 485 S.E.2d 913 (S.C. 1997), the child was repeatedly beaten by a caretaker but was not specifically diagnosed as a victim of battered child syndrome. The court held evidence of the prior

injuries as inadmissible *Lyle* evidence. Thus, prosecutors must make sure the medical diagnosis of battered child syndrome is addressed in cases of multiple injuries to the same child.

A 2004 case raises the question of whether a *Jones/Council* test applies to questions of biomechanics, an area of increasing importance in the literature on shaken baby syndrome. In *Wilson v. Rivers*, 593 S.E.2d 603 (S.C. 2004), the court examined whether a physician was properly excluded as an expert in biomechanics. The physician was prepared to testify that a plaintiff's back injuries were not caused by a car accident. The court makes several statements that sound like a ruling on the underlying science: "Dr. Harding's specialized knowledge would assist the jury to determine the facts in issue. . . he was better qualified than the jury to evaluate the force of a moving vehicle on the human body." 593 S.E.2d at 605. However, in a footnote, the court cites *State v. Council* and says: "Although Dr. Harding is an expert in biomechanics, the trial court has not addressed the question whether the underlying science of biomechanics is reliable to determine what injuries could have been caused by this particular accident." 593 S.E.2d at 606, n.5. Thus, the court appears to be saying a person can be qualified to testify (based in part on an examination of the underlying science), but at the same time be disallowed, ultimately, to testify about the subject matter if the particular specialty is deemed unreliable.

Certainly, if a defense expert attempts to testify about the biomechanics involved in a shaken baby case, it is necessary and proper for the prosecution to insist upon an analysis of the reliability of the underlying science pursuant to *Council*.

Behavioral Characteristics of Child Victims

In *State v. Schumpert*, 435 S.E.2d 859, 862 (S.C. 1993), one expert testified that the behaviors of the 13-year-old victim were "not attributable to normal teenage hormonal changes," but rather such behaviors indicated the child was a victim of sexual abuse. Another expert testified that the victim was "tearful, nervous, and had fluctuating eating habits, nightmares, lethargy, hyper-vigilance, and problems with anger and guilt." The expert testified these behaviors were typical of victims of child sexual abuse. *Id.* at 861. Citing *State v. Alexander*, 401 S.E.2d 146 (S.C. 1991), as precedent, the *Schumpert* court upheld the admission of rape trauma evidence either to prove the charged offense, or to rebut an inference that the victim's behavior was inconsistent with such trauma. 435 S.E.2d at 861-62. The only limitation is that the probative value of the evidence outweigh its prejudicial effect. 435 S.E.2d at 862. The *Schumpert* court also expressly overruled *State v. Hudnall*, 359 S.E.2d 59 (S.C. 1987), which held testimony of behavioral characteristics of victims of child sexual abuse inadmissible for purposes of proving the abuse occurred. 435 S.E.2d at 862.

In *State v. Weaverling*, 523 S.E.2d 787 (S.C. Ct. App. 1999), the court held an expert does not have to personally interview the victim to testify as to behavioral characteristics of sexual abuse victims.

The court made several important rulings in *State v. White*, 605 S.E.2d 540 (S.C. 2004). In *White*, an expert testified that the adult victim's symptoms were "consistent with" those of a recent trauma victim. The court reaffirmed the admissibility of rape trauma syndrome testimony in cases of sexual assault. Moreover, the court specifically held testimony that a victim's symptoms are "consistent with" a sufferer of trauma is probative and not unduly prejudicial.

A final important feature of the *White* decision is the court's holding on the admissibility of an expert's comment on the credibility of a victim. Although such testimony is normally improper, the court held that in this case the defense opened the door by asking the witness whether she had cases in which she did not believe the victim. By opening the door to the expert's opinion on credibility issues, the court held the defense could not then complain about evidence that the expert believed this victim. While prosecutors should not elicit such testimony absent door-opening by the defense, prosecutors should be ready to offer the evidence if the defense opens the door by questions of this sort.

Medical Examinations of Children

In *Oblachinski v. Reynolds*, 706 S.E.2d 844 (S.C. 2011), the supreme court declined to recognize the existence of a duty flowing between a physician and a third party where the physician misdiagnosed child sexual abuse and the charges were brought against the alleged abuser based on the misdiagnosis. The court acknowledged the potential impact of establishing liability in the context of child sexual abuse investigations, "In our view, the good faith willingness of medical providers to identify the existence of sexual abuse should not be chilled or otherwise compromised by subjecting them to malpractice actions."

The case highlights the need for experienced medical professionals to conduct medical examinations of children suspected of being sexually abused. In *Oblachinski*, the medical examination of the four year old victim was conducted by a physician who examined the child for thirty seconds to one minute, took photographs and a video, and diagnosed a torn hymen. The physician concluded that the child had been sexually abused. Another physician examined the child, found no torn hymen and concluded that the child had been misdiagnosed. The original examining physician admitted his misdiagnosis. For a general discussion of physical findings in child sexual abuse examinations, see: Joyce A. Adams, Katherine Harper, Sandra Knudson, and Juliette Revilla, *Examination Findings in Legally Confirmed Child Sexual Abuse: It's Normal to be Normal* (ABA Center on Children and the Law 2007).

Battered Woman Syndrome

The supreme court has upheld expert testimony on battered woman syndrome to establish a claim of self-defense in a homicide case. *State v. Hill*, 339 S.E.2d 121 (S.C. 1986). See also *State v. Grubbs*, 577 S.E.2d 493 (S.C. Ct. App. 2003). Further, an expert may express an opinion as to the defendant's state of mind (i.e., the defendant believed she was in danger of serious bodily harm). See *State v. Wilkins*, 407 S.E.2d 670 (S.C. Ct. App. 1991).

A mother who is prosecuted for acts of omission that cause harm to a child may raise a comparable defense — that, due to her status as a battered woman, she could not act to protect the child. For a discussion of the issues raised by this defense, see Myers, *Myers on Evidence of Interpersonal Violence*, § 9.09, at 1010 – 1018 (5th ed. 2011).

Repressed Memory

In *Moriarty v. Garden Sanctuary Church of God*, 534 S.E.2d 672 (S.C. 2000), the supreme court held that a person may assert the “discovery rule” when the person claims to have repressed memories of childhood sexual abuse. That is, the statute of limitations does not run during the period a person has “repressed” memories of childhood sexual abuse. Although the court did not specifically examine the admissibility of expert testimony on the topic, it strongly inferred that such testimony would be proper. Indeed, the court held that such a case can proceed only if expert testimony corroborates an alleged victim’s claim. 534 S.E.2d at 680 (“We further hold that expert testimony is required to prove both the abuse and the repressed memory.”).

Credibility of Victims

While an expert may testify that a child’s behaviors are consistent with abuse, the expert may not vouch for the credibility of a victim. In *State v. Dempsey*, 532 S.E.2d 306 (S.C. Ct. App. 2000), for example, the expert testified that when a child says they’ve been sexually abused, “ninety-five to ninety-nine percent of the time, that’s the truth.” *Id.* at 308. The court held that this testimony improperly vouched for the credibility of the victim. However, the court also ruled that the trial court’s limiting instruction adequately cured any prejudice. *Id.* at 309. *See also State v. Douglas*, 671 S.E.2d 606 (S.C. 2009)(witness testified that, after interviewing child victim, witness concluded the child victim needed a medical exam; court rejected appellant’s argument that the testimony showed the witness believed the witness was telling the truth); *State v. Kirton*, 671 S.E.2d 107 (S.C. Ct. App. 2008)(expert witness was a medical doctor who conducted both physical exam and forensic interview of child victim; court found witness testimony that the physical exam was consistent with the interview was proper as forming the basis for the witness medical opinion); *but see Smith v. State*, 689 S.E.2d 629 (S.C. 2010)(court found defense counsel ineffective for failing to object to forensic interviewer’s testimony as to victim’s statements that went beyond time and place of incident and to forensic interviewer’s testimony that she believed victim was telling the truth); *see also State v. Jennings*, No. 27043, 2011 WL 4356520 (S.C. Sep 19, 2011)(trial court erred in admitting written reports of forensic interview which contained conclusions that children made compelling disclosures).

Forensic Interviewer as Expert Witness

In *State v. Douglas*, 626 S.E.2d 59 (S.C. Ct. App. 2006) *aff’d in part, rev’d in part*, 671 S.E.2d 606 (S.C. 2009), the court of appeals affirmed the trial court’s decision to allow a victim assistance officer

employed by a county sheriff to testify as an expert in the field of forensic interviewing. The officer conducted a forensic interview of an eight year old concerning the child's allegations that her stepfather sexually assaulted her when she was seven. The South Carolina Supreme Court reversed the court of appeals decision in part in *State v. Douglas*, 671 S.E.2d 606 (S.C. 2009). In reversing the supreme court of appeal's decision upholding the trial court's qualification of the witness as an expert witness, the court decided that the testimony provided by the witness was not required to be presented by an expert witness. In footnote 2 of the opinion, the supreme court noted that appellate courts in six other states have upheld qualification of expert witnesses in the field of forensic interviewing. With respect to qualification of forensic interviewers, the court concluded: "Although there may be a case in which qualification of an expert in this field is proper, we find no necessity in the present case." *Id.* at 608 n.2. *See also State v. Baker*, 700 S.E.2d 440 (S.C. Ct. App. 2010)(error to qualify witness as expert in forensic interviewing but no prejudice resulting from error).

While the court of appeals decision in *Douglas* may not be cited as precedent for recognition of a forensic interviewer as an expert witness, the decision nonetheless is useful for South Carolina's forensic interviewers and for solicitors who proffer the testimony of forensic interviewers as expert witnesses. The court of appeals' opinion includes a review of the law on expert witnesses, including South Carolina case law, and includes a discussion of case law in other states which have recognized forensic interviewers as expert witnesses. For a detailed article on forensic interviewers as expert witnesses at trial, *see Victor Vieth, The Forensic Interviewer at Trial: Guidelines for the Admission and Scope of Expert Witness Testimony Concerning an Investigative Interview in a Case of Child Abuse*, William Mitchell Law Journal, Vol. 36:1, 186 (2009).

Conducting the Forensic Interview

Professionals in South Carolina have been trained in the conduct of forensic interviews since 2001. Forensic interviewers in South Carolina use a well-recognized protocol and South Carolina's interviewers are trained in the use of the protocol. Interview techniques may be questioned as demonstrated in *South Carolina Department of Social Services v. Mary C.*, No. 4891, 2011 WL 444401 (S.C. Ct App. filed Sep. 21, 2011) which involved mother's appeal from a family court decision in which the trial court found the child was sexually abused by an unknown person.

The case began as a private custody action filed by the mother. Approximately three months into the private custody action, the child's counselor notified DSS that she believed the child's father was sexually abusing the daughter. DSS investigated and filed an intervention action alleging that the child's placement with father put the child at substantial risk of sexual abuse. The family court subsequently consolidated the private custody action and the intervention action. Following seven days of hearing, the trial court found the child was sexually abused by an unknown perpetrator.

Mother's contention on appeal was that the trial court erred in finding that an unknown perpetrator, as opposed to father, had sexually abused the child. The court of appeals, in an extensive analysis of the evidence, found that the evidence, while conflicting, was ample to support the trial court's decision.

Evidence presented during the seven day of hearings included evidence concerning the identity of the perpetrator such as testimony of the child's therapist, a forensic interviewer, and two expert witnesses who testified for father.

In May 2007, shortly before [the child's] overnight visitation was to begin with Father, Mother scheduled therapy sessions with ... a specialist in sexual abuse and post-traumatic stress disorders. [The specialist] testified that [the child], who was almost three years old, began to display sexualized behaviors in August 2007 ... and stat[ed] after prompting from [the specialist] that she, her sister and Father touched and licked her "bottom" while they were in Father's bed. [An expert in forensic interviewing of child abuse] testified before the court. [The forensic interviewer] stated that, in the forensic interview, [the child] made disclosures about being sexually abused by her sisters and Father.

[Father's expert], an expert in the assessment and treatment of sexual behavior issues in children, testified before the court. [She] reviewed the DSS files; the written reports and videos from [the child's] sessions with the [specialist and forensic interviewer]; treatment records from [the child's] pediatricians; Father's polygraph results; interview reports and affidavits from Mother, Father and Father's two daughters; and the GALs' reports. [Father's expert] was highly critical of [the specialist's] interview techniques, specifically her continuing to have therapy session with [the child] about the sexual abuse allegations until a full assessment was conducted. [Father's expert] stated a child of [the child's] age is easily influenced, and repetitive sessions and questions about allegations could inadvertently and inappropriately reinforce those allegations with the child. [Father's expert] also opined that [the forensic interviewer] inappropriately led [the child] and continued to repeat the same questions to the child until she was satisfied with [the child's] responses.

In affirming the trial court's decision, the court of appeals noted that the trial court considered evidence of the child's disclosures to a therapist and forensic interviewer: "In so finding, the family court held [the child's] disclosures were not trustworthy based on the methodology employed by her therapists in eliciting her sexual abuse disclosures. The family court relied on [Father's experts'] conclusions that [the child's] therapists engaged in inappropriate leading and suggestive tactics, which were below the appropriate standard and protocol for such interviews."

For a comprehensive review of research and literature supporting the CornerHouse RATAC forensic interview protocol, *see* Jennifer Anderson, Julie Ellefson, Jodie Lashley, Anne Lukas Miller, Sara Oljer, Amy Russell, Julie Stauffer, and Judy Weigman, *The CornerHouse Forensic Interview Protocol: RATAC®*, 12 T.M. Cooley J. Pract. & Clinical L. 193 (2011).

B. Offender profiles

For years, prosecutors have steadfastly objected when defense counsel attempt to use offender profile evidence to show that the defendant is not the type of person who commits sex offenses against children. Offender profiling has been around for many years and as sex offender research continues to expand, more is known about how sex offenders function. At present, profiling evidence is much like polygraph evidence: it is intriguing and promising in some contexts, but an inadequate tool for determining the guilt or innocence of an individual. A large body of case law makes it clear that testimony profiling a person as a sexual offender is inadmissible by both the prosecution and defense. The scientific community does not recognize such a profile, and courts are nearly uniform in rejecting testimony that a particular defendant does or does not match the profile of an offender. For a thorough summary of the literature and case law, *see* Myers, *Myers on Evidence of Interpersonal Violence*, § 6.28, at 587 – 590 (5th ed. 2011). *See also* *United States v. Powers*, 59 F.3d 1460 (4th Cir. 1995) (addressing both profiling generally and the plethysmograph; the court also discusses the relevancy of profiling evidence); *R.D. v. State*, 706 So. 2d 770 (Ala. Crim. App. 1997) (profiling); *Leftwich v. State*, 538 S.E.2d 779 (Ga. Ct. App. 2000) (plethysmograph); *State v. Cavaliere*, 663 A.2d 96 (N.H. 1995) (profiling); *State v. Spencer*, 459 S.E.2d 812 (N.C. Ct. App. 1995) (plethysmograph).

Specific approaches to presenting profile evidence are presented below.

Minnesota Multiphasic Personality Inventory (MMPI)

A number of psychological tests attempt to classify personalities of individuals. The most widely recognized such test is the MMPI. Consisting of more than five hundred questions, the MMPI can be used to assess whether the person suffers from a variety of mental disorders. In addition, the test has built-in validity questions that help determine whether the person is faking symptoms. The MMPI is widely used and accepted in the psychological community as a useful test for providing a psychological profile of an individual.

Although the MMPI does not directly address matters of sexual deviance, much testing has been conducted to assess whether particular types of sex offenders exhibit common personality traits. Thus, a defense expert may attempt to use an MMPI result to argue that a defendant does not possess the personality traits commonly seen in sex offenders. However, the research does not support this argument. The prevailing view in the sex offender literature is no particular personality profile attaches to a particular type of sex offender. In fact, existing research indicates precisely the opposite — sex offenders

are heterogeneous in personality type, and no single personality profile of sex offenders exists. *See* Judith V. Becker & William D. Murphy, *What We Know and Do Not Know About Assessing and Treating Sex Offenders*, 4 Psychol. Pub. Pol’y & L. 116 (1998). Thus, solicitors should object to such testimony on the grounds that it fails to meet the standards for admission of expert testimony.

Phallometry

Phallometric testing (also called plethysmography) is a common method of measuring an offender’s sexual interests in treatment settings. In phallometric testing, a sensitive ring is placed around the participant’s penis while he views slides or listens to tapes of sexual acts. The ring is connected to a plethysmograph, an instrument that measures the changes in circumference of the penis during the descriptions of the sexual acts. The sensitivity of the instruments allows the tester to detect even slight changes in arousal. Phallometric testing is deemed to be one of the most effective tools in identifying sexual deviance among certain types of sex offenders — particularly those diagnosed as pedophiles. For example, a subject who is sexually aroused by descriptions of sexual acts with young boys is likely to have a deviant sexual interest.

Offender profiling testimony raises the question of whether a person who does not indicate arousal to such pictures can be excluded as a sexual deviant. The defense argument on this point resembles the argument that evidence of a “no deception” polygraph should be admissible: a “no deviance” plethysmograph should be admitted to demonstrate the person is not aroused by the age or gender of person he is accused of molesting.

While plethysmography is widely regarded as a useful tool in sex offender treatment, professionals who use and study phallometry note several problems with its use in court. First, phallometric testing is designed to classify an offender for treatment purposes, not for fact-finding purposes. As stated by the Association for Treatment of Sexual Abusers: “Phallometric test results should not be used to make inferences about whether an individual has or has not committed a specific sexual crime.” *Ethical Standards and Principles*, Appendix A at 40 (The Association for the Treatment of Sexual Abusers, Beaverton, Ore., rev. ed. 2003) (original on file at the Children’s Law Office). In fact, no scientific research exists to demonstrate the accuracy of phallometry for this use. Thus, in any type of *Jones-Council* hearing on the admissibility of expert testimony, it would be difficult for the defense to point to any literature that demonstrates the reliability of the phallometry for such a use. For a thorough discussion of whether plethysmography passes the *Frye* test, *see In re Commitment of Sandry*, 857 N.E.2d 295 (Ill. Ct. App. 2006)(trial court did not err in relying on expert witness’s opinion based in part on plethysmography).

Second, the literature repeatedly demonstrates that certain sex offenders — most notably child molesters — can “fake” or disguise their preference. As stated in a review of the literature: “[N]umerous studies

have shown that rapists and child molesters are able to both inhibit arousal to preferred stimuli and generate arousal to nonpreferred stimuli.” W.L. Marshall & Yolanda M. Fernandez, *Phallometric Testing with Sexual Offenders: Limits to Its Value*, 20 Clinical Psychology Review 807, 810-11 (2000). In other words, child molesters are able to appear stimulated by adult scenarios and repress arousal when given depictions of sex with children. Since there is currently no method of determining when a person is faking, phallometry for the purposes of determining guilt is of no help to the jury. *See also* E. Kalmus & A.R. Beech, *Forensic Assessment of Sexual Interest: A Review*, 10 Aggression & Violent Behavior 193, 200 (2005) (citing studies showing that up to 80% of men could suppress a penile response when they were asked to try).

Third, solicitors can challenge whether the proposed testimony is relevant. As stated by the North Carolina Court of Appeals:

In view of the evidence before the trial court tending to show that a lack of penile response to sexual stimuli involving children is not probative of one’s guilt or innocence of child sexual abuse, we question, without deciding, the relevance of [the expert’s] testimony.

State v. Spencer, 459 S.E.2d 812, 816 (N.C. Ct. App. 1995). This argument applies equally to profiling based on the MMPI or other tests that do not purport to identify child sexual abusers.

In *State v. Jarrell*, 564 S.E.2d 362 (S.C. Ct. App. 2002), the court held that an expert’s opinion that the defendant was not a pedophile was not relevant. The defendant was the mother of a ten-month-old baby boy who was convicted of homicide by child abuse, accessory before the fact of murder, and accessory after the fact of murder. An autopsy revealed evidence of severe and repeated sexual abuse. Although defendant was not convicted of a CSC with a minor charge, the prosecution presented evidence at trial that she participated in sexually abusing her son. At trial, an expert proposed to testify that she did not fit the “diagnostic qualifications for pedophilia.” *Id.* at 370. The court found this proposed testimony not relevant since the appropriate classification was “incest abuse” since she was alleged to have sexually abused her son. *Id.* The court stated: “Because there are significant differences in the identification and diagnosis of incest abusers and pedophiles, we do not feel that [the expert’s] testimony was relevant.” *Id.* *Cf. Underwood v. State*, 425 S.E.2d 20 (S.C. 1992) (in a case that is likely limited due to its unique facts and posture, the court discussed testimony as to personality or character traits of child molesters).

Abel Assessment for Sexual Interest

A tester using the Abel Assessment for Sexual Interest (AASI) shows pictures of clothed adults and children in various contexts and asks the participant to rate his degree of sexual interest. *See* Gene G. Abel et al., *Classification Models of Child Molesters Utilizing the Abel Assessment for Sexual InterestTM*,

25 Child Abuse & Neglect 703 (2001). While the participant focuses on his pencil and paper responses, the tester measures the visual reaction time (VRT): The length of time the participant focuses on the different pictures. The tester then sends the raw results to employees of Dr. Abel's company who, using a proprietary formula, turn the raw data into summary results which are returned to the tester. Based on these figures, the tester interprets a person's sexual interest.

The theory underlying the AASI is that the greater a person's sexual interest, the longer the person will look at the picture. According to the creator of the AASI, this test is objective and difficult to fake because of the large number of pictures that are shown. Thus, it presumably can differentiate between certain child molesters and non-molesters. Creators of the AASI claim that this instrument can accurately measure the degree of a person's sexual deviancy using an objective measure, but it has had a mixed reception by the courts. For example, in *United States v. Birdsbill*, 243 F. Supp. 2d 1128 (D. Mont. 2003), the district court subjected the AASI to a full *Daubert* analysis. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In looking at the first element — whether the technique can be tested — the court held the AASI failed. Since Dr. Abel maintains a proprietary claim over the formula behind his test, no one can conduct independent analysis of the AASI. The court stated: “This court is not equipped to interpret or test Dr. Abel's formula, and because Dr. Abel has not released his formula for testing by other scientists, it remains merely an untested and unproved theory.” 243 F. Supp. 2d at 1133-34. A Texas court was even more critical on this point, stating:

For all we know, [the Abel formulas] and their components could be mathematically based, founded upon indisputable empirical research, or simply the magic of young Harry Potters' mixing potions at the Hogwarts School of Witchcraft and Wizardry. [The tester] simply interpreted the “information” returned from Atlanta. How that undeniably pivotal “information” was contrived or applied by those in Atlanta remains a mystery.

In re CDK, 64 S.W.3d 679, 683-84 (Tex. Ct. App. 2002) (rejecting an attempt by child protective services to introduce the results of an AASI test to show a parent's propensity for sexual deviancy).

The *Birdsbill* court also found that the AASI likewise failed the second of the *Daubert* factors: whether it had been subjected to peer review and publication. 243 F. Supp. 2d at 1135. The court reviewed the literature and determined that no independent studies had upheld the AASI, since Dr. Abel was involved in the publication or supervision of the studies that are positive. *Id.*

The third *Daubert* factor — known or potential error rate — was also viewed skeptically by the court, which stated that the error rate ranged from “poor” to “appalling.” *Birdsbill*, 243 F. Supp. 2d at 1135-36. Finally, the court looked at whether the AASI was generally accepted in the field. The court held that it was “clear” that the relevant scientific community “does not generally accept the AASI test as a diagnostic test for pedophilia, although it may have other commonly accepted uses in treatment and

corrections.” *Id.* at 1136. Thus, the court concluded that the AASI could not be used by the defense to characterize the defendant as being sexually interested or uninterested in boys under the age of 12. *But see United States v. Robinson*, 94 F. Supp.2d 751 (W.D. La. 2000) (allowing defense expert testimony that the AASI demonstrated the defendant did not have a sexual interest for young girls).

In sum, although the test has several strengths as a tool for assessing sex offenders, at present strong objections can be made to the AASI as a tool that points to guilt or innocence. In addition to the points made above, the following issues also should be considered:

- The instrument — at least as currently tested — applies only to “non-incest” cases. Therefore, in the numerous cases involving intra-familial offenders, the AASI has not been adequately tested.
- Since the AASI is not intended as a tool to detect a particular offender’s guilt or innocence, solicitors can argue that testimony in the guilt phase is not relevant. The creators of the instrument note that the instrument gives a “probability value” — that is, the probability that an offender fits into one of the categories of offenders identified by the test.

However, the creators note:

[P]robability values must be incorporated into the evaluator’s total assessment of the evaluatee, leading to the evaluator’s clinical opinion regarding the evaluatee. In the litigious environment of the courtroom, probability values can be treated as if they represent certainty about whether or not an individual has committed a specific act of child molestation. This would be an inappropriate use of probability values.

Gene G. Abel et al., *Classification Models of Child Molesters Utilizing the Abel Assessment for Sexual Interest™*, 25 Child Abuse & Neglect 703, 715 (2001). Although the article goes on to imply that such testimony may nonetheless be helpful to a finder of fact, a prosecutor can argue that, if the test does not help determine guilt or innocence, then it is not relevant.

- The literature arguably remains inadequate when judged by the standards of *State v. Council*, 515 S.E.2d 508 (S.C. 1999). To date, only a handful of articles have been published demonstrating the accuracy of the AASI in differentiating child molesters from non-child molesters. Some of this literature has been written by the creators of the AASI, who have a financial interest in the success of the instrument. *See People v. Franks*, 761 N.Y.S.2d 459 (N.Y. County Ct. 2003) (disallowing AASI testimony and finding the Abel studies “self-serving”).

While this interest does not indicate the research is inferior, it highlights the importance of verification by independent researchers. If the AASI is accurate, research by others should be able to replicate the findings of the Abel studies. In the meantime, prosecutors can argue that the AASI falls short of demonstrating the degree of reliability and acceptance necessary for its use in court — when used for the purposes of commenting on a defendant’s factual guilt or innocence.

- The AASI is susceptible to faking by a defendant who is aware that his visual reaction time is being tested. *See E. Kalmus & A.R. Beech, Forensic Assessment of Sexual Interest: A Review*, 10 Aggression & Violent Behavior 193, 209 (2005).

C. DNA Evidence

Because of the ever-increasing importance of DNA evidence, the science underlying such evidence must be sound. South Carolina appellate courts have decided numerous specific issues related to DNA evidence. These cases are summarized on the following page.

DNA Case Law

S.C. Supreme Court

Cannon v. South Carolina Department of Probation, Parole and Pardon Services, 641 S.E.2d 429 (S.C. 2007). Court held S.C. Code Ann. § 23-3-620 (2003) requiring submission of DNA sample by those paroled on or after July 1, 2000, did not apply to petitioner who was paroled in 1983.

State v. Proctor, 595 S.E.2d 476, 478 (S.C. 2004). The court held it was error for trial judge not to conduct a *Bryant* hearing [415 S.E.2d 806] to examine “internal DNA proficiency test results [of the SLED DNA lab] in order to explore the possibility of challenging the accuracy of the lab’s assessments.” However, the error did not require reversal of defendant’s conviction. *Note*: The court simultaneously issued a separate opinion involving the same defendant and same issue arising in another county. *See State v. Proctor*, 595 S.E.2d 480 (S.C. 2004) (Opinion No. 25810). The language and rulings of the cases are almost identical.

State v. Ramsey, 550 S.E.2d 294 (S.C. 2001) (potentially contaminated evidence admissible).

State v. Carter, 544 S.E.2d 835 (S.C. 2001) (even though a saliva sample was missing, the state established a proper chain of custody through all of the custodians of the evidence; the missing sample went to the weight, not admissibility, of the evidence).

State v. Council, 515 S.E.2d 508 (S.C. 1999) (expert testimony on mitochondrial DNA analysis is admissible under a *Jones* analysis).

State v. Register, 476 S.E.2d 153 (S.C. 1996) (DNA and RFLP reliable and admissible without *Jones* hearing; SLED’s use of population frequency statistics upheld).

State v. Dinkins, 462 S.E.2d 59 (S.C. 1995) (DNA was sole source of evidence linking defendant to the crime).

State v. Ford, 392 S.E.2d 781 (S.C. 1990) (RFLP generally accepted).

S.C. Court of Appeals

State v. Mathis, 597 S.E.2d 872 (S.C. Ct. App. 2004) (missing blood samples go to weight, not admissibility, of evidence when each custodian in the chain of custody testifies).

State v. Hyman, 471 S.E.2d 466 (S.C. Ct. App. 1996) (trial judge refused defendant’s request for charge concerning “probability of guilt versus DNA results”).

State v. McFadden, 458 S.E.2d 61 (S.C. Ct. App. 1995) (DNA evidence admissible).

State v. China, 440 S.E.2d 382 (S.C. Ct. App. 1993) (DNA analysis admissible).

VI. Post-trial Issues

A. Sexually Violent Predator Commitments

South Carolina's law permitting the civil commitment of sexually violent predators, S.C. Code Ann. § 44-48-10 – 44-48-170 (Supp. 2008), is one of many such laws in the country. *See In re Luckabaugh*, 568 S.E.2d 338, 347 n.8 (S.C. 2002) (citing SVP statutes in 16 states). The constitutionality of sexually violent predator statutes has been upheld frequently by state and federal courts. The first major decision, *Kansas v. Hendricks*, 521 U.S. 346 (1997), upheld SVP laws against ex post facto and double jeopardy challenges when applied retroactively. *Hendricks* also upheld the essence of the law against a substantive due process challenge.

South Carolina courts likewise have upheld South Carolina's SVP law. *See In re Luckabaugh*, 568 S.E.2d 338 (S.C. 2002) (rejecting ex post facto, substantive due process, and equal protection arguments); *In re Allen*, 568 S.E.2d 354 (S.C. 2002) (rejecting ex post facto and double jeopardy challenges); *State v. Gaster*, 564 S.E.2d 87 (S.C. 2002) (rejecting ex post facto claim); *In re McCracken*, 551 S.E.2d 235 (S.C. 2001) (rejecting multiple evidentiary and constitutional claims); *In re Matthews*, 550 S.E.2d 311 (S.C. 2001) (rejecting double jeopardy claims).

One major challenge to these laws remains viable. In *Kansas v. Crane*, 534 U.S. 407 (2002), the U.S. Supreme Court struck down the portion of the Kansas SVP law. The detainee in *Crane* was diagnosed as suffering from exhibitionism and antisocial personality disorder, but there was no finding at his commitment hearing that he was unable to control his behavior. 534 U.S. at 411. The Kansas law, like the South Carolina law, has two separate mental disorder designations: a sexually violent predator is a person who suffers from a "mental abnormality" or a "personality disorder." S.C. Code Ann. § 44-48-30(1) (Supp. 2008). The statute defines "mental abnormality" as "a mental condition *affecting a person's emotional or volitional capacity* that predisposes the person to commit sexually violent offenses." S.C. Code Ann. § 44-48-30(3) (Supp. 2008) (*italics added*). However, neither the Kansas nor the South Carolina statute defines "personality disorder." The detainee in *Crane* argued that he was detained without any finding that he lacked the emotional or volitional capacity to control his behavior. The Supreme Court held that substantive due process requires such a finding before a person may be detained involuntarily. The court held:

[W]e recognize that in cases where lack of control is at issue, "inability to control behavior" will not be demonstrable with mathematical precision. It is enough to say that there must be proof of serious difficulty in controlling behavior. And this, when viewed in light of such features as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender

whose serious mental illness, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.

534 U.S. at 413.

South Carolina appellate courts have read the South Carolina statute to include the volitional requirement identified in *Crane*. For example, in *Luckabaugh*, the detainee was diagnosed as suffering from “sexual sadism, a major mental abnormality.” 568 S.E.2d at 341. The court, in applying *Crane*, noted the definition of “mental abnormality” under the act — which requires evidence of inability to control behavior — and stated that this statutory requirement is “the functional equivalent of the requirement in *Crane*.” 568 S.E.2d at 349. *See also In re Harvey*, 584 S.E.2d 893 (S.C. 2003) (diagnosis of pedophilia is a mental abnormality with a lack of control element); *In re Kennedy*, 578 S.E.2d 27 (S.C. Ct. App. 2003) (diagnosis of pedophilia is a mental abnormality with a lack of control element).

In re Chandler, 676 S.E.2d 676 (S.C. 2009) considered the State’s appeal of the trial court’s order dismissing the State’s petition and finding that there was no probable cause to believe Chandler met the statutory definition of a sexually violent predator. In the trial court’s view, the State did not establish that Chandler suffered from a mental abnormality or a personality disorder that makes it likely he will engage in acts of sexual violence in the future and did not establish that Chandler used physical violence in the commission of the offenses. In reversing the trial court, the court explained that, under the statute, mental abnormality was a mental condition affecting a person’s emotional or volitional capacity that predisposes the person to commit sexually violent offenses. The court considered Chandler’s record of offenses and evidence offered by the State that Chandler had not completed his treatment program at SCDC. As to physical violence, the court noted, “In any event, physical violence is not a prerequisite under the Act.” *Citing In re Brown*, 643 S.E.2d 118 (S.C. Ct. App. 2007). The court noted that, once Chandler has been evaluated, he will still have the opportunity to refute the State’s allegations that he meets the definition of an SVP at the trial on the merits. *See also, In re Beaver*, 642 S.E.2d 578 (S.C. 2007)(where evidence of Beaver’s pedophilia was offered, court held that the lower court erred in finding that State failed to provide sufficient evidence that the respondent suffers from a mental abnormality or personality disorder that may cause more sexually violent behavior).

Establishing probable cause

In *White v. State*, 649 S.E.2d 172 (S.C. Ct. App. 2007), State sought to commit defendant pursuant to the Sexually Violent Predator Act. Trial court found no probable cause to establish defendant was a sexually violent predator. In making its determination, trial court refused to consider the following evidence offered by the State: an incident report showing defendant repeatedly stalked, sexually assaulted and threatened another victim over a five year time frame (that incident report resulted in defendant’s arrest for unlawful use of a telephone, harassment, violation of a restraining order and assault; an incident report that charged defendant with the rape of another victim whom he had stalked over a year and a half; and a

statement from the mother of defendant's son which claimed the relationship between the mother and defendant was filled with lies, deception, control, physical and mental abuse and continued infidelity and contained the mother's opinion that if released, defendant would pose an extreme danger to society). On appeal, State argued the trial court erred in refusing to admit the evidence of defendant's prior offenses which did not result in convictions. The court of appeals agreed with State and construed language in S.C. Code § 44-58-50 regarding the multidisciplinary team's consideration of a person's records, including "the person's criminal offense record", to encompass both convictions and offenses not resulting in convictions.

In re Beaver, 642 S.E.2d 578 (S.C. 2007). Respondent pled guilty to one count of lewd act of minor and had been previously convicted in Tennessee of four counts of aggravated rape of a child, two counts of aggravated sexual battery, and two counts of incest. Prior to respondent's release from prison, the Multiple Disciplinary Team and Prosecutor's Review Committee found probable cause to believe the respondent meets the statutory criteria for civil commitment as a sexually violent predator pursuant to S.C. Code Ann. § 44-48-30(1). At the SVP hearing, the trial judge opined that the SVP act was not intended for someone who pleads to a non-violent fondling charge and, therefore, refused to find probable cause to find respondent a sexually violent predator. The State appealed claiming the trial court erred in dismissing the SVP petition. The court found that the trial court erred by finding no probable cause because respondent meets the criteria delineated in the SVP Act. The legislature has deemed it appropriate to consider an attempt to commit a lewd act on someone under sixteen as a violent act.

In re Brown, 643 S.E.2d 118 (S.C. Ct. App. 2007). Appellant was convicted voyeurism after being caught peeping into his neighbor's bedroom window. Following service of his sentence and release from prison, he was caught peeping in another bedroom window and pled guilty to voyeurism. The State commenced an action pursuant to the SVP statute. Based on State's petition, trial court found probable cause to believe appellant was a sexually violent predator and ordered his detention. At probable cause hearing, the trial court found State failed to establish probable cause that Appellant was a sexually violent predator. On State's appeal of trial court's decision, court of appeals held that the probable cause hearing established a clear pattern of sexually deviant behavior and that Appellant showed no sign of rehabilitation or remorse. The court found the State did establish probable cause and Appellant had characteristics of a sexually violent predator.

B. Sex Offender Registration and Public Notification

The U.S. Supreme Court has rejected all recent constitutional challenges to sex offender registration and public notification statutes comparable to the registration scheme set forth in S.C. Code Ann. § 23-3-400 - 520 (Supp. 2004). In *Smith v. Doe*, 538 U.S. 84 (2003), the Court examined whether the adverse impact of public notification resulting from an Alaska sex offender registration statute amounted to punishment. The court held first that the clear intent of the notification laws is to protect the public by informing them

of the whereabouts of a released sex offender. The court then found that the negative effects of the law — even though they may be “lasting and painful” — do not negate the civil nature of the law. Since the law is not punitive, there is no ex post facto violation. 538 U.S. at 101. *See also State v. Walls*, 558 S.E.2d 524 (S.C. 2002) (rejecting ex post facto claim and finding South Carolina’s law non-punitive).

On the same day the Alaska case was decided, the Court also upheld a Connecticut sex offender notification statute. The released offenders in *Connecticut Dept. of Pub. Safety v. Doe*, 538 U.S. 1 (2003), argued that information was released without adequate procedures to ensure the accuracy of the information, in violation of principles of procedural due process. Specifically, the released offenders were arguing that the state had failed to provide an adequate forum for determining whether they were currently dangerous.

The Supreme Court found this argument to be entirely misplaced. Rather, the Court held that the Connecticut public notification law represents a legislative determination that information on all released offenders should be available, without a need for a determination of current dangerousness. 538 U.S. at 7. Since “dangerousness” is therefore irrelevant to the statutory scheme, “any hearing on current dangerousness is a bootless exercise.” *Id.* at 8. *See also Hendrix v. Taylor*, 579 S.E.2d 320 (S.C. 2003) (rejecting equal protection and procedural due process challenges).

Challenges to the South Carolina sex offender registration statute and to restrictions on sex offenders have included challenges to the Department of Probation, Parole and Pardon Services application of S.C. Code Ann. § 24-21-430 (Supp. 2005) which allows the court to impose and to modify the conditions of probation. The statute also allows the director of the department to supervise probation by way of developing policies and procedures for imposing conditions of supervision on probationers. For example, in *State v. Hicks*, 675 S.E.2d 769 (S.C. Ct. App. 2009), *vacated State v. Hicks*, 692 S.E.2d 919 (S.C. 2010), the court of appeals rejected separation of powers and ex post facto challenges to the circuit court’s order that respondent violated his probation by violating a condition of probation not incorporated in his original sentence but instituted by PPP after respondent’s initial sentence. The court of appeals’ *Hicks* opinion distinguished *State v. Stevens*, 646 S.E.2d 870 (S.C. 2007) (holding S.C. Code § 24-21-430 does not authorize PPP to add conditions of probation only conditions of supervision), by holding that the circuit court merely enhanced a judicially ordered condition of probation. *See also State v. Davis*, 649 S.E.2d 178 (S.C. Ct. App. 2007) (judge at probation hearing is not authorized to order defendant to placement on sex offender registry as a condition of probation).

In a challenge brought by the State to the decision of the trial court pursuant to a hearing conducted under S.C. Code Ann. 24-21-560 (A) & (B) (2007), the court of appeals in *State v. Garrard*, 700 S.E.2d 269 (S.C. Ct. App. 2010), affirmed the trial court’s finding that appellant had not willfully violated a term of community supervision. Appellant was released from prison and entered the community supervision

program. He committed no violations for almost two years at which time he was assisting his brother in moving a washer and dryer. While doing so, he stopped at his brother's workplace which was 750 feet from Lexington High School (one term of supervision was that appellant will not enter into, loiter or work within one thousand feet of a school). At the hearing on the violation, appellant conceded that he violated the terms of supervision but denied that his violation was willful. In affirming the trial court, the court of appeals noted, "In order to prove a willful violation in this case, the State was required to prove that [appellant] voluntarily and intentionally went within one thousand feet of a school, and that he knew doing so was a violation of a term of the community supervision program."

Appendix One:

Evidence Worksheets

The forms provided on the following pages provide a framework upon which to develop local investigative worksheets and checklists.

Evidence Worksheet for Immersion Burns

Case number: _____ Suspect's name (if known): _____

Today's date: _____ Relationship to victim: _____

Time at location: _____ am/pm Victim's name: _____

Location: _____

Physical evidence

•

Is the tub/sink wet? (Check all in house)

Location and yes/no: _____

Location and yes/no: _____

Location and yes/no: _____

Location and yes/no: _____

Location and yes/no: _____

•

Water heater setting:

_____ degrees (indicate Fahrenheit or Celsius)

•

Type of faucet:

Single _____

Double _____

Other _____

•

Which faucet is closest to the edge of the tub?

Hot _____ n/a _____

Cold _____

- What is the construction of the sink or tub (porcelain, fiberglass, etc.)? _____

- Distance from outside edge of tub to nearest faucet:

- Faucet height from bottom of tub:
_____ inches
- Measurements of sink/tub (in inches)
Width of tub. Inside: _____. Total: _____
Top length. Inside: _____. Total: _____
Bottom length. Inside: _____. Total: _____
Inside depth. Inside: _____. Total: _____
If applicable:
Height of counter: _____
How far to faucet? _____
- Temperature of running hot water temperature:
Temperature after 0 seconds: _____
Temperature after 5 seconds: _____
Temperature after 10 seconds: _____
Temperature after 20 seconds: _____
Peak temperature: _____
- Temperature of running cold water:
Temperature after _____ seconds: _____

•

Running water temperature (full hot and cold)

Temperature after 0 seconds: _____

Temperature after 5 seconds: _____

Temperature after 10 seconds: _____

Temperature after 20 seconds: _____

Peak temperature: _____

•

Full hot water standing 5 inches deep (temperature measured in middle of tub at mid-depth).

Time to reach one inch: _____ Temperature: _____

Time to reach two inches: _____ Temperature: _____

Time to reach three inches: _____ Temperature: _____

Time to reach four inches: _____ Temperature: _____

Time to reach five inches: _____ Temperature: _____

General interview questions (indicate who provided the information)

Date and time of the injury:

Can the child bathe independently or is (s)he bathed by caregiver?

Who was bathing child at time of injury? _____

How long does suspect (or caregiver) allege child was in tub/sink? _____

Who else was in the house at the time? _____

What does suspect (or caregiver) say child's reaction was? _____

Did suspect (or caregiver) change water heater setting? _____

Is there evidence of home remedy? _____

Information from suspect or caregiver (indicate who provides the information)

•

Child's medical history: _____

•

Does child have medical insurance or Medicaid? _____

•

Child's doctor(s) & all medical facilities where child has received treatment in past 5 years: _____

•

Suspect (or caregiver) ran a tub of water on my request:

Yes _____

No _____

Medical and other information

Was 911 called? Yes _____ (If yes, get copy of tape) No _____

What was the doctor or responding EMS told? By whom? _____

Is there any evidence of more than one burn? _____

Is there a history of domestic violence or abuse of other children in this household? Is there other criminal history in the household (drugs, etc.)? _____

Attachments

-
-
-

This image shows a blank sheet of white paper with horizontal ruling lines. The lines are evenly spaced and extend across the width of the page. There are no margins, text, or other markings on the paper.

Evidence Worksheet for Falls

Case number: _____ Suspect's name (if known): _____

Today's date: _____ Relationship to victim: _____

Time at location: _____ am/pm Victim's name: _____

Location: _____

Physical evidence

Item alleged by caretaker that child fell from: _____

Height of item to floor: _____

Length and width of item: _____

Type of flooring: _____

Blood on item? _____

Blood on floor? _____

Seize the item if at all possible.

Interview of suspect or caregiver (indicate who provided this information)

●

Date and time of the injury: _____

●

Did anyone witness the fall? _____



Who else was in the house at the time? _____



Ask the suspect or caregiver to re-enact fall (videotape this, if possible).



Age of child: _____



Medical history: _____



Does the child have medical insurance or Medicaid? _____



Developmental milestones (confirm with child's doctor). When did the child begin to:

Turn over _____

Scoot _____

Crawl _____

Sit up _____

Walk _____

Climb _____



Does the caretaker/suspect believe the child has any developmental delays?



Who is the child's primary caregiver? _____

● Child's doctor(s) and facilities where child has received treatment in the past 5 years (confirm with other sources):

Other information

1. Was 911 called? (Get copy of tape) _____
2. Was child taken to emergency room? _____
3. What was doctor and/or responding EMS told? By whom? _____

4. Is there a history of domestic violence or abuse of other children in this family?
Other criminal history (drugs, etc.)?

Attachments

1. Attach all medical reports (including physician's assessment of child's developmental milestones and delays, extent of injury).
2. Attach photographs of: (1) child's injuries; (2) the item child reported to have fallen from; (3) the room where injury reported to have occurred; (4) other possible crime scenes.

Evidence Worksheet for Failure to Thrive

Case number: _____ Suspect's name (if known): _____

Today's date: _____ Relationship to victim: _____

Time at location: _____ am/pm Victim's name: _____

Location: _____

Child's age and date of birth _____

Child's height _____ Child's weight: _____

Information from suspect (or caregiver)

1. Child's medical history. _____

2. Does child have medical insurance or Medicaid? _____

3. Child's doctor(s) and all medical facilities where child has received treatment in the past 5 years (confirm with other sources): _____

4. Feeding history (especially within the last 24 hours):

a. Can the child eat independently or is (s)he fed by caregiver? _____

b. Where was the child fed? _____

- c. What was the child fed? By whom? _____

- d. Food (or bottle) prepared By whom? _____
- e. Child's reaction? Adult's reaction to child? _____

- f. Where is the bottle/bowl/plate? _____
- g. How was the formula mixed? (Ratio of water to formula) _____
- h. Did the child have anything to drink? When? _____
- i. Who is the child's primary care giver? _____

Scene (remember to take photographs)

1. Document location and condition of food for child: _____

2. Document location and condition of food for rest of family: _____

3. Financial information:
- a. What household members are employed? Where? Take-home pay? _____

b. Does the household receive:

WIC? _____

Food Stamps? _____

Other? _____

c. Is there a life insurance policy on the child? Who is the beneficiary? _____

d. Are there family photos? Is the child included in those photos? _____

e. Is there a pet? Document location and condition of food for pet. _____

f. Is there a history of domestic violence or abuse of other children in this family? Other criminal history (drugs, etc.)? _____

Medical and other information

1. Was 911 called? (Get a copy of tape) _____

2. What was the doctor or responding EMS told? By whom? _____

3. Does the child have any medical conditions? Receiving treatment? _____

Attachments

1. Copies of the child's growth charts and other medical records.
2. Attach photographs of the child.

Follow-up with photographs of the child, weight, measurements, and medical condition in several weeks

Appendix Two

Child Fatalities Data Sheet

Reprinted by permission of the Juvenile Unit, Aurora (CO) Police Department.

Child's Information

Name of child: _____

Age: _____ Date of birth: _____

Parental Information

1. Child's birth hospital: _____

2. Any complications during pregnancy? (Y/N) _____ If yes, explain:

3. Type of delivery: _____

4. Number of prenatal clinic visits: _____ Physician seen: _____

5. Problems found during visits: _____

6. Unusual nutritional habits of either parent: _____

7. During pregnancy, did the mother:

a. Have any health problems? _____

b. Take any medications (otc or prescription)? _____

c. Smoke? _____ What brand? _____ Packs a day: _____

d. Packs a day after delivery? _____

e. Does father smoke? _____ What brand? _____ Packs a day: _____

6. Mother's family medical history: _____

7. Father's family medical history: _____

8. Number of previous live births: ____ Still births: ____ Pregnancies: _____
9. Any deceased siblings? ____ Sex and ages: _____

10. Number of living siblings: ____ Sex and ages: _____

11. Complications during previous births or pregnancies: _____

Scene Information

1. Date child last seen alive: ____/ ____/ ____ Time: ____ : ____ By: _____
2. Time of last feeding: ____ : ____ What was fed (including quantity): _____

3. Describe bed/ crib/ sleeping structure including coverings, contents, attachments or any structural defects: _____

4. Describe diaper contents: _____

5. Was the death observed (Y/N)? ____ By whom and at what time? _____

6. Any resuscitation attempts (Y/N)? ____ By whom: _____

7. What type of attempt (CPR, etc): _____
8. Who found the child? _____
9. Position of body when the child was found: _____

10. Position of child's face when found: _____

11. Was anything in the child's mouth or nose? (Y/N) ____ Describe: _____

12. Room temperature: _____
13. Room lighting: _____

Child's history

1. Any recent change in the child's eating habits or appetite? (Y/N) ____ Explain: _____

2. Did the child have past or recent:

cold _____

wheezing _____

choking _____

sniffles _____

irritable _____

sweating _____

diarrhea _____

fussiness _____

fever _____ (temp.: _____)

cough _____

vomiting _____

Explanations: _____

3. Has child been exposed to any contagious diseases past or recently? (Y/N) _____

4. History of any injury or illness: _____

5. History of medication (prescription, over-the-counter, home remedies): _____

6. Pediatrician's name: _____
Phone: _____
Date of last visit: ____/____/____ Reason for last visit: _____

7. Has child had any shots? (Y/N) ____ Inoculation dates and types: _____

8. Allergies: _____

9. Did child appear to be developing normally? (Y/N) _____

10. Did child appear well nourished? (Y/N) _____

11. Did child appear well cared for? (Y/N) _____

12. Describe any bruises, cuts, diaper rashes or any other marks on the child's body: _____

13. Birth weight: ____ lbs ____ oz. Was the child full term? (Y/N) _____
14. Was the child premature? (Y/N) ____ If premature, how many weeks of gestation? _____
15. APGAR score at 1 minute: _____ at 5 minutes: _____
16. Was child one of multiple births? (Y/N) _____
17. Child ever stop breathing or turn blue? (Y/N) _____

18. What was the child fed since birth? _____

19. Breast fed? (Y/N or unknown) _____ Any cow's milk? (Y/N or unknown) _____
20. Any honey used in formula? (Y/N or unknown) _____ If so, how much? _____
21. Quantity of food each feeding? _____

Care information

1. Who was in control of the child 24-48 hours prior to death? _____

2. Were any baby-sitters or day cares used? (Y/N) _____ If yes, who, when, where, licensed?

3. Did any problems arise during or after a daycare or baby-sitter was used? (Y/N) _____

4. Number of other children under supervision of same care-giver: _____

-
-
5. Household environment: _____
-
-
-
-
-
6. Evidence of alcohol abuse: _____
-
-
-
-
-
7. Evidence of drug abuse: _____
-
-
-
-
-
8. Serious physical or mental illness in household: _____
-
-
-
-

9. Have police been called to home in the past? _____

10. Has the family had prior contact with social services? (Y/N) _____
Name of social worker: _____ County: _____
Name of social worker: _____ County: _____
Documented history of child abuse: _____

11. Odors, fumes or peeling paint in household: _____

12. Dampness, visible standing water or mold growth: _____

13. Pets in household: _____
14. Type of dwelling: _____ Water source: _____ Number of bedrooms: _____
15. Main language in home: _____ On public assistance? _____
16. Number of persons in household:
Adults (over 17): _____ Children: _____ Total: _____
17. Number of smokers in house: _____
18. Does usual care-giver smoke? (Y/N) _____ Amount: _____

Medical notes

1. Were the following conditions or diseases screened for?

glutaric acidemia (subdural hematoma and retinal hemorrhages): _____

methylmalonic acidemia (toxicity buildup of propionic acid): _____

von willebrand's disease (bleeding disorder, bruises, etc): _____

osteogenesis imperfecta (brittle bone disease): . _____

alagille's syndrome (includes jaundice and liver disease): _____

2. Skeletal survey conducted? (Y/N) _____
3. Internal bleeding? (Y/N) _____
4. Retinal hemorrhages present? (Y/N) _____
5. Subdural hematoma found? (Y/N) _____

Appendix Three:

Criminal Child Abuse Investigative Checklist

APRI, *Investigation and Prosecution of Child Abuse* (3d ed. 2004).
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1. Review and note available information

- _____ How, when, and by whom reported
- _____ CPS report/caseworker and action taken to date
- _____ Police reports
- _____ Medical exam or autopsy/findings/name of doctor
- _____ Witness statements
- _____ Prior reports concerning this child
- _____ Prior reports/complaints/convictions concerning this suspect
- _____ Records check (local, F.B.I.) on suspect
- _____ Need for interpreters

2. Contact child

- _____ Note vital statistics: DOB, height, weight
- _____ Note home address, school, grade
- _____ Note any known disabilities
- _____ Note observations of physical appearance
- _____ Note demeanor, emotions displayed
- _____ Take photos of injuries
- _____ Make referrals to counseling and other support services

Child Interview

- _____ Explain your role
- _____ Elicit background information, put child at ease, assess developmental/intellectual level
- _____ Determine whether medical exam has occurred
- _____ Determine child's expectations, fears, desired consequences
- _____ Provide information and let child know how to contact you

Obtain a Detailed Description of the Alleged Abuse

- _____ Name of suspect and relationship to child (family, friend, stranger)
- _____ Physical description of suspect
- _____ When alleged abuse occurred
 - ☐ Once or more than once
 - ☐ How often
 - ☐ Child's age at time

- ☐ First incident
- ☐ Most recent incident
- ☐ Time of day/duration
- ☐ Association with other events
- ☐ Recollection of individual incidents
- _____ Location of abuse (state, county, city, building, room, other)
- _____ Any corroborative details: specific descriptions of clothing, furniture or other items, of other people nearby, of TV shows on at time, of child's feelings at time of abuse
- _____ Enticements, bribes, gifts, promises, explanations, threats, intimidation by suspect
- _____ Elements of secrecy
- _____ Suspect's words during abuse
- _____ Whether child has diary/journal
- _____ Whether child has correspondence from suspect
- _____ Whether child gave correspondence or other items to suspect
- _____ Whether other witnesses present
- _____ Where other family members were
- _____ Whether other victims seen/known
- _____ Child's attitude toward suspect then/now (close, loving, hostile, fearful)
- _____ First person child told about abuse and his/her reaction
- _____ If applicable, why child delayed in disclosing
- _____ Others child told and reactions
- _____ Drugs used by suspect or given to child
- _____ Alcohol used by suspect or given to child
- _____ Prior abuse (physical or sexual) of child
 - ☐ By this suspect
 - ☐ By anyone else

Add for Sexual Abuse

- _____ Clarify child's terms for anatomy
- _____ Note child's exact words describing alleged abuse
- _____ Nature of alleged abuse
 - ☐ Oral/vaginal/anal contact (descriptions of positions, movement)
 - ☐ Fondling/penetration
 - ☐ Made to perform sex acts on offender
 - ☐ Use of pornography (films, magazines, pictures)
 - ☐ Use of foreign objects, sexual devices, contraceptives, lubricants
 - ☐ Whether photos taken of child
 - ☐ Whether child saw photos of other children
 - ☐ Clothes on or off – child and offender
 - ☐ Pain, bleeding or discharge
 - ☐ Suspect's behavior/words during and after sex acts
 - ☐ Whether child saw/felt ejaculation
- _____ Description of any unusual physical characteristics of suspect (tattoos, birthmarks)
- _____ Description of suspect's genitals: pubic hair (color), penis (erect/flaccid, circumcised or not), or any other unusual or unique features
- _____ If suspect ejaculated, where: in child's mouth/vagina/rectum, elsewhere on child's body, on bedding/carpet/clothing
- _____ Did child wipe self or suspect clean it up? If so, with what and where is it?

Add for Physical Abuse

- _____ Any weapons used: description and location
- _____ Child's explanation for specific injuries
- _____ Reason (if known) for suspect's use of force (punishment, anger)
- _____ Whether suspect violent toward others
- _____ Whether child had prior medical problems; if so, when and what

3. Medical examination of child

- _____ Find out if exam already done; if so,
 - ☐ When
 - ☐ By whom conducted
 - ☐ Who sought medical attention for child
- _____ If not already done, arrange ASAP
- _____ Obtain consent to acquire medical reports; arrange for legible copies
- _____ Interview medical personnel and determine how to contact in future
- _____ Document any statements made by child
- _____ Note any special procedures used
 - ☐ Colposcope
 - ☐ Photos
 - ☐ Videocolposcope
 - ☐ Toluidine blue dye
 - ☐ Wood's Lamp
 - ☐ Proctoscopy or anoscopy
 - ☐ CT scan
 - ☐ X-rays/skeletal survey
 - ☐ Screen for blood disorders/clotting studies
 - ☐ Consultation with/referral to experts
- _____ Collect any physical evidence gathered by doctor
 - ☐ Specimens and samples
 - ☐ Photos
 - ☐ Child's clothing worn during assault
- _____ Arrange for necessary crime lab analysis
 - ☐ Presence of sperm, acid phosphatase, P 30
 - ☐ Blood/serology analysis
 - ☐ Hair comparison
 - ☐ Fiber comparison
 - ☐ DNA testing

*Medical Evidence/Observations
Consistent with Sexual Abuse*

- _____ Evidence of violence anywhere on body
 - ☐ Bleeding, bruises, abrasions
 - ☐ Bitemarks
 - ☐ Broken bones
- _____ Positive results for presence of semen
 - ☐ Fluorescence with Wood's Lamp
 - ☐ Motile/nonmotile sperm
 - ☐ Positive acid phosphatase or P30
- _____ Pregnancy/Abortion

- _____ Sexually transmitted disease present
 - ☐ Tests conducted
 - ☐ Sample collection method
 - ☐ Body sites tested (anus, vagina, mouth)
 - ☐ Gonorrhea
 - ☐ Syphilis
 - ☐ Chlamydia trachomatis
 - ☐ AIDS
 - ☐ Herpes
 - ☐ Trichomonas vaginalis
 - ☐ Venereal warts
 - ☐ Nonspecific vaginitis
 - ☐ Pubic lice
 - ☐ Any vaginal/penile discharge
- _____ Itching, irritation or trauma of any kind in genital or anal area
- _____ Foreign debris in genital or anal area
- _____ Vaginal area injury/findings
 - ☐ Enlarged vaginal opening in prepubertal child
 - ☐ Posterior fourchette lacerations
 - ☐ Other lacerations/scarring, and location
 - ☐ Redness, focal edema or abnormalities (synechiae, changes in vascularity)
 - ☐ Absent or thinned hymenal ring
 - ☐ Laxity of pubococcygeus muscle – gaping vaginal opening
- _____ Anal area injury/findings
 - ☐ Reflex relaxation of anal sphincter
 - ☐ Positive wink reflex
 - ☐ Complete or partial loss of sphincter control
 - ☐ Lacerations, scarring, erythema
 - ☐ Fan-shaped scarring
 - ☐ Loss of normal skin folds around anus
 - ☐ Thickening of skin and mucous membranes
 - ☐ Skin tags
 - ☐ Gaping anus with enlargement of surrounding perianal skin

Medical Evidence/Observations

Consistent with Physical Abuse

- _____ Doctor's opinion regarding cause of child's death or injury as nonaccidental
- _____ Delay or failure to seek medical treatment by child's parent(s)/caretaker(s)
- _____ History given inconsistent with severity, type or location of injury
- _____ History inconsistent with child's developmental level/ability to injure self
- _____ Different explanations of injury from different family members
- _____ Child fearful, unwilling to explain cause of injury
- _____ Change in details during history-taking or given to different people
- _____ Current physical injury accompanied by signs of multiple prior injuries or neglect, e.g., malnutrition, lack of regular medical care
- _____ Parenting disorders apparent, e.g., alcoholism, drug abuse, psychotic behavior
- _____ Parent/caretaker irritated, evasive, vague, reluctant to give information
- _____ Doctor's opinion that child's injuries are consistent with battered child syndrome

Injuries Suspicious for Physical Abuse

Soft tissue injuries

Bruises, Abrasions, Welts and Lacerations:

- _____ In location other than bony prominences, such as buttocks, lower back, genitals, inner thighs, cheeks, ear lobes, mouth, neck, under arms, frenulum
- _____ Multiple bruises at different stages of healing over large area of body, especially if deep
- _____ Adult bite marks
- _____ Wrap-around, tethering or binding injuries
 - ☐ Neck, ankle or wrist circumferential injuries; rope burns
 - ☐ Injuries due to choking or gagging
 - ☐ Trunk encirclement bruising
- _____ Patterns/imprints/lacerations suggesting inflicted injury
 - ☐ Grab, pinch, squeeze or slap marks
 - ☐ Strap or belt marks
 - ☐ Looped cord marks
 - ☐ Imprints or lacerations from other objects: (tattooing, punctures, whips, sticks, belt buckles, rings, spoons, hairbrush, coat hangers, knives)

Internal or abdominal injuries

- _____ History or severity of injury indicating child was pummeled, thrown or swung against wall or other object, kicked, or hit with blunt, concentrated force
- _____ Lack of history indicating auto accident or fall from high place
- _____ Internal/organ damage
 - ☐ Ruptured or perforated liver
 - ☐ Injuries to spleen
 - ☐ Injuries to intestines
 - ☐ Injuries to kidneys
 - ☐ Injuries to bladder
 - ☐ Pancreatic injury
 - ☐ Injuries to other internal organs
- _____ External symptoms
 - ☐ Nausea, vomiting
 - ☐ Constipation
 - ☐ Shock
 - ☐ Blood in urine
 - ☐ Swelling, pain, tenderness

Head injuries

- _____ Multiple bruises/lumps on scalp
- _____ Hemorrhaging beneath scalp or hair missing due to hair pulling
- _____ Subdural hematomas (never spontaneous)
- _____ Suspect caused injuries by violent shaking if:
 - ☐ Bone chips at cervical vertebrae
 - ☐ Compression fractures to ribs
 - ☐ Damage to neck muscles and ligaments (child unable to turn head to side or up and down)
 - ☐ Spinal cord damage
 - ☐ No skull fracture or external bruising or swelling
 - ☐ Whiplash or shaken baby/impact syndrome diagnosis
- _____ Suspect caused injuries by abusive blunt force trauma if:
 - ☐ Skull fracture

- ☐ Scalp swelling and apparent bruising
- ☐ Caretaker denies recent injury sufficient to account for trauma or claims accident which is insufficient to cause such injury
- _____ Subarachnoid or other intracranial hemorrhages with no sufficient “accidental” explanation
- _____ Skull fractures without history of significant “accidental” force
- _____ Injuries to eyes without sufficient accidental or other explanation
 - ☐ Retinal hemorrhaging, especially if other evidence of nonaccidental head trauma present
 - ☐ Black eyes
 - ☐ Detached retinas
 - ☐ Petechia (small spots of blood from broken capillaries) or other bleeding in eye
 - ☐ Cataracts
 - ☐ Sudden loss of visual acuity
 - ☐ Pupils fixed, dilated or unresponsive to light
 - ☐ Eyes not tracking or following motion
- _____ Ear injuries without appropriate explanation
 - ☐ Sudden hearing loss
 - ☐ “Cauliflower” ear
 - ☐ Bruising to ear or surrounding area
 - ☐ Petechia in ear
 - ☐ Blood in ear canal
- _____ Injuries to nose without appropriate explanation
 - ☐ Deviated septum
 - ☐ Fresh or clotted blood in nostrils
 - ☐ Bridge of nose bent or swollen
- _____ Injuries to mouth without appropriate explanation
 - ☐ Chipped, missing or loose teeth caused by blow to mouth
 - ☐ Bruising in corners and lacerations of frenulum, of upper and lower lip, and of tongue (indicative of exterior gag)
 - ☐ Petechia inside nostrils, around nose, or near corners of mouth (could indicate manual suffocation if child has stopped breathing)

Skeletal injuries

- _____ Multiple fractures at different stages of healing
- _____ Repeated fractures to same bone
- _____ Spiral fractures (usually femur, tibia, forearm or humerus)
- _____ Rib fractures, especially in children less than three
- _____ Bone chips in bones connecting at elbow or knee, caused by jerking and shaking (avulsion of the metaphyseal tips)
- _____ Growth plate separations caused by shaking (“bucket handle” and “corner” fractures)
- _____ Injuries to bone — bleeding and thickening/calcification — which is repeatedly hit but not broken (sub-periosteal proliferation, apparent on x-ray)
- _____ Fractures to bones not usually accidentally broken, such as scapula and sternum

Inflicted burns

- _____ Child burned on unusual part of body (palms, soles, genitals)
- _____ Parent/caretaker delays in seeking medical help

- _____ Multiple burns of different ages and different burn patterns
- _____ Symmetrical, patterned burn with sharp margins: no indication of child trying to get away (child held down or hot object deliberately applied)
- _____ Hot water burns
 - ☐ Immersion/dipping burn – oval shape, usually buttocks and genital area
 - ☐ Doughnut-shaped burn surrounding buttocks (indicates child forcibly held down)
 - ☐ Glove or stocking burn (immersion of hand or foot)
 - ☐ Even immersion lines, lack of splash burns (child prevented from thrashing around, trying to get out)
- _____ Contact burns
 - ☐ Cigarette, cigar, match tip, pilot light flame burns (usually deep circular burns)
 - ☐ Imprint of object responsible for burn with sharp margins (usually deep and uniform burn): stove burner (star, circular, coil shapes); heating grate, radiator; iron; curling iron; heated knife or hanger

4. Contact other witnesses

- _____ Determine all people with relevant information about child or suspect and obtain statements (complainant, child's parents/caretakers, family members, friends, emergency medical technicians (EMTs), ambulance attendants, emergency room doctors, medical examiner, co-workers, teachers, CPS personnel, neighbors, therapists)
- _____ Note identifying information for each witness: DOB, address, phone, employment, employment phone, relationship to child and/or suspect, marital status
- _____ Check for prior criminal record of witness
- _____ Note witness' demeanor and attitude toward child and/or suspect, and reaction to allegations
- _____ Determine degree of familiarity with child and/or suspect
- _____ Determine whether they witnessed any unusual or inappropriate behavior/contact between suspect and child or other children
- _____ Determine whether they know of or suspect any other children who were victimized or at risk
- _____ Determine whether they know of additional potential witnesses
- _____ Determine whether they can verify/refute any facts supplied by child or suspect
- _____ Awareness of any motives of child or others to falsely accuse suspect
- _____ Observation of any physical/medical symptoms in child (see preceding list)
- _____ Determine whether suspect or caretaker gave explanation to witness of child's injury
- _____ Obtain written, signed statements of witnesses (or recorded, if appropriate)
- _____ Observation or knowledge of any unusual behavior/behavior changes in child before or after disclosure; some possibilities include:

Behavioral Extremes

- _____ Constant withdrawal, depression, suicide attempts or self-destructive behavior
- _____ Overly compliant or passive
- _____ Overly eager to please
- _____ Afraid to talk or answer questions in parent's/suspect's presence
- _____ Avoiding suspect or refusal to be with suspect
- _____ Fearful of a place: day-care, school, baby-sitter's, suspect's room
- _____ Fear of all males, all females or all adults
- _____ Wary of physical contact
- _____ Unusual self-consciousness; e.g., unwilling to change clothes for gym class or to participate in recreational activities

- ___ Constant fatigue, listlessness or falling asleep in class
- ___ Excessive self-control; never cries or exhibits curiosity
- ___ Frequent unexplained crying
- ___ Apprehension when other children cry
- ___ Poor peer relationships or deterioration in existing friendships
- ___ Inability to concentrate
- ___ Unusual craving for physical affection
- ___ Unexplained or extreme aggressiveness, hostility, physical violence
- ___ Turning against a parent, relative, friend
- ___ Delinquency, including theft, assaultive behavior
- ___ Alcohol or drug use/abuse
- ___ Running away
- ___ Frequent absences/truancy from school
- ___ Early arrival, late departure and very few absences from school
- ___ Sudden increase or loss in appetite
- ___ Change in school performance or study habits
- ___ Compulsion about cleanliness (wanting to wash or feeling dirty all the time)

Psychosomatic Symptoms

- ___ Headaches
- ___ Stomachaches
- ___ Rashes
- ___ Stuttering

Regressive Behavior

- ___ Reverting to accidents/bed-wetting
- ___ Baby talk
- ___ Excessive clinging
- ___ Thumb sucking
- ___ Carrying blanket
- ___ Wanting to nurse
- ___ Otherwise acting younger than age

Sleep Disturbances

- ___ Bad dreams
- ___ Refusal/reluctance to sleep
- ___ Excessive sleeping
- ___ Sleepwalking
- ___ Sudden fear of darkness
- ___ Other sleep pattern changes

Unusual Sexual Behavior or Knowledge

- ___ Acting out sexually with toys, other children
- ___ Excessive masturbation
- ___ French kissing

- _____ Sexually provocative talk
- _____ Seductive behavior toward adults
- _____ Preoccupation with sexual organs of self or others
- _____ Sexually explicit drawings
- _____ Sexual knowledge beyond norm for age

Other Behaviors

- _____ Dressed inappropriately for weather (e.g., always in long sleeves)
- _____ Enuresis/encopresis
- _____ Pseudo-mature behavior
- _____ Extreme hunger
- _____ Sudden weight loss or gain
- _____ Personality disorders

5. Interview witnesses to whom child made statements

- _____ Determine exact circumstances of child's disclosure
- _____ When and where statements made
- _____ Who else present
- _____ Words used by child
- _____ Details provided by child
- _____ Incident precipitating disclosure (e.g., spontaneous disclosure, child responding to questions)
- _____ Child's demeanor/emotional state
- _____ Child's attitude toward suspect
- _____ Child's expressed concerns/fears
- _____ Witness' reaction to child

6. Interview complainants (first reporters, if other than child)

- _____ Cover all applicable areas in 4. and 5.
- _____ Determine what caused them to report
- _____ Child's disclosure, or
- _____ Suspicions based on other factors without disclosure from child
- _____ Assess potential motives of complainants

7. Interview child's parent(s)/caretaker(s)

- _____ Cover all applicable areas in 4, 5 and 6
- _____ Determine child's medical and mental health history
 - ☐ Obtain names of doctor(s)/therapist(s)
 - ☐ Obtain consent to receive relevant medical records
 - ☐ Prior abuse of child (when, where, who, action taken, results)
 - ☐ Prior accusations of abuse by child (when, where, who, action taken, results)
 - ☐ Child's general personality/functioning (school performance, hobbies, friends)
 - ☐ Child's normal schedule/routine
 - ☐ Verification of timing/events related by child
 - ☐ Suspect's access to child (past and present)
 - ☐ Ongoing difficulties in family (e.g., divorce, custody or visitation disputes, arguments) and child's awareness of/reaction to them
 - ☐ Determine whether family is supportive of child
 - ☐ Obtain signed medical release for child's medical records

For Physical Abuse

- _____ When injury/sickness of child first noticed and what noticed
- _____ What they know or suspect about cause
- _____ Where child was/who with child before injury/sickness became apparent (usually cover as much as possible up to five days before)
- _____ Child's apparent health and activity for same period before child became ill or developed noticeable symptoms
- _____ Time and contents of child's last meal
- _____ Child's sleep activity prior to injury
- _____ Prior illnesses or injuries of child since birth
- _____ Prior medical treatment/hospitalization of child, name of provider(s), name of person who took child for treatment, need for treatment and cause of injuries
- _____ Suspect's responsibility, if any, for discipline of child; normal methods used
- _____ Action taken when noticed injury/sickness
- _____ Health of other children in family
- _____ Name of family doctor or child's pediatrician
- _____ Child's school attendance, names of schools and teachers
- _____ Recent behavioral changes, suspect's explanations for change, events that preceded, suspect's feelings about the change
- _____ If no explanation, periods when child was unsupervised or with others
- _____ Child's developmental level (i.e., child crawling, walking)
- _____ Any problems with toilet training
- _____ Suspect's awareness of child's medical problems/disabilities
- _____ Parenting or child care classes/instruction received by suspect

For Sexual Abuse

- _____ Determine child's awareness of/exposure to sexual matters
- _____ TV, movies, videos, magazines
- _____ Observation of adults
- _____ Talking to others (sex education in school, friends, personal safety curriculum)
- _____ Determine sleeping arrangements (intrafamilial abuse)
- _____ Determine who bathed child

8. Interview other family members of child

- _____ Cover applicable areas in 4, 5, 6 and 7
- _____ Determine whether they saw/heard any direct or indirect evidence of abuse
- _____ Determine if they were ever abused

9. Interview suspect's spouse, significant other or others in family/household

- _____ Cover applicable areas in 4–8 above
- _____ Determine statements made by suspect
- _____ Suspect's reaction to allegation or explanation for it
- _____ Unusual behavior of suspect before or after allegation
- _____ Suspect's opportunity to abuse child (time with child, alone or otherwise)
- _____ Relationship known/observed between child and suspect
- _____ Whether suspect owns/owned/possessed items described by child
- _____ Other children in contact with suspect

- _____ Prior arrests, accusations, convictions of suspect
- _____ Suspect's violence toward others
- _____ Suspect's employment (past and present)
- _____ Suspect's residence (past and present)
- _____ Prior marriages of suspect
- _____ All children/stepchildren of suspect
- _____ Suspect's physical and mental health
 - ☐ Prior illness/infections/treatment
 - ☐ Alcohol or drug abuse
 - ☐ Names of doctors/therapists seen
- _____ Description of witness' relationship with suspect
- _____ Description of witness' background (marital, employment)
- _____ Whether suspect (or witness) keeps diary, journal, calendar, computer records, address book
- _____ Whether suspect has another residence, post office box, storage area
- _____ Unusual hobbies or interests of suspect

For Sexual Abuse

- _____ Sleeping arrangements in home
- _____ Responsibilities for children's bathing and discipline in home
- _____ Distinctive anatomical features of suspect (scars, tattoos, birthmarks)
- _____ Suspect's use (if any) of pornography, sexual aids or implements, birth control
- _____ Presence of sexually transmitted disease in suspect or witness
- _____ Strange/unusual/distinctive sexual practices or preferences of suspect
- _____ Knowledge of prior accusations by other children against suspect
- _____ Knowledge of prior convictions
- _____ Knowledge of suspect's history, prior addresses, prior contact with children

For Physical Abuse

- _____ Suspect's and others' responsibility for child's discipline
 - ☐ Usual methods/frequency
 - ☐ Amount of force
 - ☐ Use of weapons/implements
 - ☐ Loss of control
- _____ Any expressions of frustration, disappointment or anger with child by suspect
- _____ Suspect's access to weapons/implements consistent with child's injuries
- _____ Witness' knowledge of suspect's explanations for child's injuries

10. Interview suspect

- _____ Advise of Miranda rights when appropriate
- _____ Stress interested only in hearing and determining the truth: be sympathetic
- _____ Obtain background, biographical information
 - ☐ DOB, Social Security Number
 - ☐ Vital statistics: height, weight
 - ☐ Past and present residences
 - ☐ Past and present employment
 - ☐ Marital status/prior marriages
 - ☐ Number of children and their names, locations and ages
 - ☐ Mailing address(es), PO. box(es)

- ☐ Neighborhood/community organizations or affiliations
- ☐ Hobbies and interests
- ☐ Regular doctor
- ☐ Magazine subscriptions, especially if sexually-oriented
- _____ Suspect's descriptions of time spent alone with child
- _____ Suspect's schedule and routine (e.g., work and leisure time, vacation time)
- _____ Note suspect's demeanor and any changes during interview (e.g., angry, uncomfortable, vague, evasive, amused, unconcerned)
- _____ Any indication of psychosis, mental health problems, alcohol or drug dependence, physical or medical problems
- _____ Suspect's familiarity with child and child's routine
- ☐ Acknowledgment/awareness of child's age or any disabilities
- ☐ Acknowledgment of time alone with child
- _____ Suspect's description of nature and quality of his relationship with child
- _____ Suspect's description of child
- ☐ "Problem child"
- ☐ "Special" child
- ☐ Good/bad
- ☐ Obedient/disobedient
- ☐ Smart/dumb
- ☐ Honest/dishonest ("pathological liar")
- ☐ "Bruises easily"
- ☐ "Clumsy"
- ☐ "Always/never in trouble"
- ☐ Unrealistic expectations of child
- ☐ Complaints about minor, irrelevant or unrelated problems with child
- _____ Suspect's description of ways of dealing with problems with child
- _____ Suspect's description of relationship with spouse, complainant, other important witnesses
- _____ Types and frequency of sexual activity with spouse or peers
- _____ Frequency of masturbation and types of fantasies
- _____ Use of pornography
- _____ Unusual sex practices
- _____ Corroboration of as many details as possible supplied by child
- _____ Suspect's explanation, in detail, of reasons for allegation of abuse
- ☐ Child's motive to lie
- ☐ Motive of others to lie
- ☐ Details of "unintended" or "accidental" touching or injury
- ☐ Detailed explanation of how child initiated event
- ☐ Detailed explanation of injuries observed on child
- ☐ Explanation for why suspect delayed or did not seek medical attention for injured child
- ☐ Extent and details of any abusive conduct suspect admits
- _____ Suspect's terminology for body parts
- _____ Request names and locations of anyone who can corroborate information given by suspect
- _____ Request items which could corroborate suspect's claims (calendar, work records)
- _____ Request names of suspect's friends and co-workers; if someone you are aware of is left out by suspect, find out why
- _____ Ask suspect to verify he has told truth and whether he has anything to add
- _____ In physical abuse/homicide cases, have suspect explain child's injuries

_____ In physical abuse/homicide cases, have suspect reenact incident on video

11. Search for/seize physical evidence

From Child

- _____ Photos of injuries/general appearance
- _____ Clothing worn at time of assault, especially if torn, bloody
- _____ Bedding which may contain evidence
- _____ Items received from suspect
- _____ Calendars, diaries, journals
- _____ Receipts of purchases made by suspect for child
- _____ Other items to corroborate details of child's account (see list below)

From Scene

- _____ Instruments, weapons used by suspect
- _____ Movies, videos, magazines
- _____ Photograph, diagram, videotape scene; note working condition of TV, video equipment
- _____ Take measurements of areas/items involved, especially in physical abuse cases with claim of accident or self-infliction of injury by child
- _____ In burn cases:
 - ☐ Seize/photograph items consistent with pattern of contact burn
 - ☐ Photograph all sinks, spigots, bathtubs, stoves, heat sources
 - ☐ Check water temperature at water heater and faucets in water burn cases
 - ☐ Measure height of tub/sink and note what tub/sink (or other site of burn) is made of
 - ☐ Test to determine surface temperature of items used to burn child and check for body residue on them
- _____ In criminal neglect cases:
 - ☐ Note, document, photograph, video general appearance of home before "cleaned up" by suspect(s)
 - ☐ Determine whether utilities on, working
 - ☐ Determine availability/condition of food appropriate for child
 - ☐ Determine condition of appliances (stove, refrigerator) and whether working
 - ☐ Determine condition/safety of electrical and plumbing features
 - ☐ Determine condition/cleanliness of sleeping areas and items, clothing for child
 - ☐ Evidence of alcohol or drugs in home
- _____ In physical abuse/homicide cases:
 - ☐ Evidence of motive for abuse (soiled underwear, bedding, diapers, medication for colic)
 - ☐ Photos/videos/diagrams of scene
 - ☐ Measurements of areas/items involved
 - ☐ Note surface child supposedly landed on in "fall" case (e.g., wood, concrete, carpeted) and measure distance from child's supposed position to point of impact
 - ☐ Photograph/seize items involved (objects which child allegedly fell from or landed on)
 - ☐ Instruments used to discipline child
 - ☐ Evidence of child's blood (on floor, wall, object)
 - ☐ Check wastebaskets, trash receptacles
 - ☐ Items listed in criminal neglect section above

Any Relevant Evidence From Suspect, Suspect's Residence, Office

- _____ Use search warrant if necessary; always request consent
- _____ Photos to show suspect's appearance or distinctive physical features

- ___ Fingerprints
 - ___ Hair, blood, saliva, semen, fingernail scrapings, dental impressions as applicable to facts
 - ___ Handwriting exemplars, voice tapes
 - ___ Clothing with potential evidentiary value
 - ___ Occupancy papers
 - ___ Phone records
 - ___ Bank or credit card records
 - ___ Work records
 - ___ Drugs or alcohol, medication provided to child by suspect
 - ___ Drugs or alcohol, medication used to cure suspect's venereal disease
 - ___ Pictures, negatives, videos, home movies of alleged victim or other children
 - ___ Camera and/or developing equipment
 - ___ Weapons/implements used to threaten or injure child
 - ___ Items left at scene by child
 - ___ Pornographic items
 - ___ Sexual aids or devices
 - ___ Computer records, journals, calendars, diaries, address books
 - ___ Any unique/distinctive items described by child (furnishings, pictures, clothing, lubricants)
 - ___ Test suspect for relevant sexually transmitted diseases; always request consent to test and accompany suspect or obtain search warrant or court order immediately
12. Use additional investigative techniques as appropriate/lawful
- ___ Obtain 911 tape
 - ___ Wire tap orders/pen registers
 - ___ Undercover officer surveillance
 - ___ Video surveillance
 - ___ Polygraph or Psychological Stress Evaluation (PSE) of suspect
 - ___ Special crime lab testing/analysis
 - ___ Consultation with outside experts
 - ___ One party consent calls by child to suspect

Appendix Four:

Sample Motions

The following sample motions were based on motions provided by Suzanne Mayes, Child Abuse Specialist with the S.C. Commission on Prosecution Coordination.

Lyle Motion Memorandum (Sexual Abuse)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF _____)	
	)	# ____ - GS - ____ - ____
STATE OF SOUTH CAROLINA)	
	)	MEMORANDUM IN SUPPORT OF
v.	)	EVIDENCE OF PRIOR BAD ACTS
	)	PURSUANT TO RULE 404(b), SCRE
DEFENDANT)	
_____)	

The defendant, John Doe, is currently charged with Criminal Sexual Conduct with a Minor — First Degree and Attempting or Committing a Lewd Act Upon a Child. The indictments allege the current crimes occurred in _____ County on or between _____. The indictments further allege that the defendant sexually assaulted two minor children, A.S. and T.J.

The State seeks to introduce the testimony of victim T.J. in the Defendant’s trial on charges concerning victim A.S. This evidence is offered pursuant to Rule 404(b), S.C.R.E., and will include the particulars and details of the sexual assault inflicted against T.J. by the defendant, John Doe.

Statement of Law

Evidence of a prior act of a defendant is not admissible for the purpose of proving a defendant to be a person of bad character. Rule 404(b), SCRE. *See State v. Nelson*, 501 S.E.2d 716 (S.C. 1998). Nor is such evidence admissible to demonstrate a defendant’s sexual propensity. *See State v. Atkins*, 424 S.E.2d 554 (S.C. Ct. App. 1992). However, evidence of other crimes, wrongs, or prior bad acts may be admissible to show “motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.” Rule 404(b), SCRE. *See State v. Lyle*, 118 S.E. 803 (S.C. 1923). The other acts must be logically relevant to the purpose for which it is introduced and evidence of the other acts must be established by clear and convincing evidence. *See State v. Bell*, 393 S.E.2d 364, 369 (S.C. 1990).

South Carolina courts have consistently applied the common scheme or plan exception to sexual assault crimes. *See State v. McClellan*, 323 S.E.2d 772, 774 (S.C. 1984). In *State v. Whitener*, 89 S.E.2d 701 (S.C. 1955), the court stated that the common scheme or plan exception:

is generally applied in cases involving sexual crimes, where evidence of acts prior and subsequent to the act charged in the indictment is held admissible as tending to show continued illicit intercourse between the same parties.

89 S.E.2d at 711 (citing *State v. Richey*, 70 S.E. 729 (S.C. 1911)).

Numerous South Carolina decisions uphold evidence of prior bad acts concerning child sexual abuse. For example, in *State v. Hallman*, 379 S.E.2d 115 (S.C. 1989), defendant was convicted of sexual offenses against a foster child committed when she was seven to nine years old. The state introduced evidence of defendant's sexual abuse of two female foster children when they were six to twelve and seven to thirteen years old. The crimes against the prior victims began seven years before the first assault of the primary victim. The court upheld admission of the prior acts, noting: each victim was a foster child; the victims were at a similar age when the abuse occurred; the abuse began in the same manner; and the abuse happened under similar circumstances (while in a barn or riding a tractor).

Many additional cases describe prior acts of sexual abuse admitted to show a common scheme or plan. *See State v. McClellan*, 323 S.E.2d 772 (S.C. 1984) (acts against other daughters admissible); *State v. Adams*, 504 S.E.2d 124 (S.C. Ct. App. 1998) (sexual abuse of victim's sister admissible); *State v. Blanton*, 446 S.E.2d 438 (S.C. Ct. App. 1994) (sexual abuse of other children admissible); *State v. Henry*, 432 S.E.2d 489 (S.C. Ct. App. 1993) (prior acts against victim's sister admissible); *State v. Wingo*, 403 S.E.2d 322 (S.C. Ct. App. 1991) (prior sexual abuse of victim's cousin admissible).

Proof of a conviction for the other crimes is not required. *State v. Blanton*, 446 S.E.2d 438, 440 (S.C. Ct. App. 1994). Any lapse of time between the prior acts and the charged offense "affects the weight and not the admissibility of the evidence." *Blanton*, 316 S.C. at 32, 446 S.E.2d at 440 (prior acts occurred seven to eight years previously).

It is important to note that the present case can be clearly distinguished from the recent decision in *State v. Tutton*, 580 S.E.2d 186 (S.C. Ct. App. 2003), where the State offered an isolated prior bad act incident from several years beforehand which was unrelated in place or type. Here, the defendant committed ongoing, similar acts of illicit conduct against A.S. and T.J.

Factual Similarities

The State contends that the sexual abuse of T.J. by the defendant is directly related to the sexual abuse committed against A.S., as proof of: 1) intent, 2) motive, 3) absence of mistake or accident, and 4) a "common scheme or plan" on the part of the defendant to obtain sexual gratification by engaging in sexual acts with minor children. Evidence is relevant if it tends to make more or less probable some matter in issue upon which it directly or indirectly bears. *State v. Alexander*, 401 S.E.2d 146 (S.C. 1991).

Specifically, the defendant planned a method of attack against each child wherein he would sexually assault them during the night while others in the home were sleeping. The admission of such evidence has real probative value as proof of intent, motive, and a common scheme or plan

that outweighs any possible prejudicial effect. It is logical to conclude from this evidence that the defendant was chiefly motivated in each case by an intent to gain sexual gratification by engaging in sexual behavior with young children while they were in his care and at his home. The evidence in this case demonstrates the existence of a common scheme or plan to sexually abuse each child under similar circumstances. There is a clear factual similarity and connection between all of the charges.

The following is a detailed description concerning the factual similarities between these cases:

1. Both victims were sexually assaulted while visiting defendant's home in _____ County. Specifically, each of the assaults occurred in the living room area of the defendant's home.
2. Both victims were sexually assaulted while others in the home were sleeping. The defendant planned a specific method of attack wherein he would enter the room and sexually assault each child as they were resting or sleeping during the night.
3. Both victims were known acquaintances of the defendant and he gained proximity and access to each child as a result of his relationship with former girlfriend N.K.
4. In both cases, the defendant took advantage of his position of authority and his role as an adult caretaker. The defendant carried out the sexual assaults against each child while they were in his charge or care.
5. Both victims were subjected to acts of vaginal fondling by the defendant.
6. Both victims were similar in age during the period of abuse. Both victims are minor females who were pre-pubescent in age when sexually assaulted.

In summary, the connection between the sexual abuse of A.S. and T.J. can be clearly perceived. The similarity and pattern of conduct existing between these crimes is substantially close.

For the foregoing reasons, the State contends the evidence concerning the defendant's prior bad acts against T.J. is extremely probative and relevant to the issue of the defendant's motive, intent, and absence of mistake while assaulting A.S. Most significantly, this evidence is probative as to the existence of a "common scheme or plan" in connection with the sexual abuse of both victims.

Respectfully Submitted:

Solicitor

Date

Motion to Protect Privileged Communications Between Therapist and Victim

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF _____)	
	)	# ____ - GS - ____ - ____
STATE OF SOUTH CAROLINA)	
	)	MOTION TO PROTECT PRIVILEGE
v.)	
_____)	
DEFENDANT)	
_____)	

Now comes the State, with its motion pursuant to state law, that notes of a counselor, social worker, or psychologist and communications between the patient and counselor, social worker, or psychologist are not discoverable under Rule 5 of the S.C. Rules of Criminal Procedure.

The South Carolina General Assembly recognized a privilege for a provider and a patient in 1989. S.C. Code § 19-11-95 states that a provider is a licensed person who enters into a relationship with a patient to provide diagnosis, counseling, or treatment of a mental illness or emotional condition. Section 19-11-95 specifically provides for a privilege between a licensed master social worker (M.S.W.) or a licensed independent social worker (L.I.S.W.). *See also Jaffee v. Redmond*, 518 U.S. 1 (1996) (recognizing a “psychotherapist privilege” for federal courts).

In *State v. Trotter*, 322 S.C. 537, 473 S.E.2d 452 (1996), the defendant argued that a rape crisis counselor should have been disclosed as a possible witness in response to his motion which asked for the “results or reports of any physical or mental examinations,” pursuant to Rule 5(a)(1)(D), SCRCrimP. The trial judge found there had not been a violation of Rule 5(a)(1)(D) since the counselor had not performed an examination of the victim and had not prepared any reports. The supreme court agreed, holding that a counselor’s notes were not discoverable. The Court affirmed the trial court’s ruling that the prosecution had no previous duty to provide the notes pursuant to Rule 5, as they were privileged information that did not constitute a “mental examination report.” The supreme court stated:

Rule 5(a)(1)(D) does not require the prosecution to disclose the fact that there has been an examination, as petitioner seems to argue, but requires the prosecution to permit the defendant to inspect and copy any *results or reports* of physical or mental examinations which are generated as a result of any such examination. In this case, there was no physical or mental examination and no results or reports were generated.

Id. at 454 (emphasis in original). The counselor stated she gave only “supportive counseling” and did not perform examinations. The Court held that counseling notes do not constitute “examinations.” The Court further held that “even if they did, notes made from those

examinations would not be subject to disclosure under Rule 5.” *See also State v. Roy*, 460 S.E.2d 277 (W. Va. 1995) (cited favorably by the court in *Trotter*).

For the foregoing reasons, the State should not be compelled to produce privileged and statutorily protected records documenting confidential communications between the victim and the counselor or psychologist.

Respectfully Submitted,

Solicitor

Date

Schmerber Motion

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF _____)	
	)	# ____ - GS - ____ - ____
STATE OF SOUTH CAROLINA)	
	)	NOTICE OF MOTION FOR
v.	)	COLLECTION OF SUSPECT
_____	)	STANDARDS
DEFENDANT)	
_____)	

The State will move before the Presiding Circuit Court Judge on _____, _____, or as soon thereafter as the matter may be heard for the Defendant to provide fifteen (15) to twenty (20) pulled pubic hairs and fifteen (15) to twenty (20) pulled head hairs to the State and/or a blood sample and/or a saliva sample.

The State requires certain blood, saliva, and/or hair samples from the Defendant in order to further proceed with the investigation of this case. The State will further show there is sufficient probable cause to require that the Defendant provide these samples, and that the taking of said samples are reasonable and justifiable intrusions which do not violate the Defendant's Fourth Amendment Rights. Furthermore, it is the State's assertion that material evidence relevant to the question of the Defendant's guilt or innocence will or may be determined by scientific testing related to said samples. In addition, the methods used to secure such evidence from the Defendant are medically safe and reliable.

Assistant Solicitor

Date

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF _____)	

STATE OF SOUTH CAROLINA	)	# __ - GS - __ - __
)	
)	
v.	)	ORDER
)	
DEFENDANT)	
)	

This matter comes before the Court on Tuesday, July 27, 2004, upon motion of the State, represented by Assistant Solicitor _____. The defendant was present and was represented by counsel, _____, Esquire.

It appears to this Court that the State requires certain blood, saliva, and hair samples from the defendant in order to further the investigation of this case. This Court further finds probable cause to require that the defendant provide these samples, the taking of said samples being reasonable and justifiable intrusions which do not violate the defendant's Fourth Amendment Rights.

Accordingly, it is hereby

ORDERED that the defendant give a blood sample, fifteen (15) to twenty (20) pulled pubic hairs and fifteen (15) to twenty (20) pulled head hairs to the State. Said blood and hair samples shall be taken by independent medical personnel in the presence of a designated representative of the State.

AND IT IS SO ORDERED.

 Judge
 _____, South Carolina

 Date

Motion for Recorded Statement

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF)	
)	
STATE OF SOUTH CAROLINA)	# ____ - ____ - ____ - ____
)	
vs.	)	MOTION FOR ADMISSION
	)	OF OUT-OF-COURT STATEMENT
	)	OF CHILD PURSUANT TO
_____,	)	S.C. CODE SECTION 17-23-175
<u>DEFENDANT</u>)	

PLEASE TAKE NOTICE that the undersigned Attorney for the State will move before this Honorable Court at a date to be determined pursuant to S.C. Code Section 17-23-175 for admission of out-of-court statement(s) made by the victim/witness in the above-captioned case, to wit: _____, date of birth _____.

_____. S.C. Code Section 17-23-175 was enacted as part of the Sex Offender Accountability and Protection of Minors Act of 2006.

Statement of Law

An out-of-court statement by a child under the age of twelve is admissible in a General Sessions Court proceeding upon satisfaction of the provisions set forth in S.C. Code Section 17-23-175 and a finding by the Court that the statement(s) provides “particularized guarantees of trustworthiness.” In the present case, the victim/witness was under the age of twelve years at the time of the making of said statement(s) or functioned cognitively, adaptively, or developmentally under the age of twelve at the time of the making of the statement(s). Furthermore, the defendant is currently charged with an offense which would require registry pursuant to the provisions of Article 7, Chapter 3, Title 23 (South Carolina sex offender registry).

Evidence offered by the State pursuant to this section includes recorded statements made by the child victim/witness to the following persons in relation to the above-captioned case:

The State offers the following facts in support of the admission of the aforementioned out-of-court statement(s):

- (1) the statement was given in response to questioning conducted during an investigative interview of the child, pursuant to S.C. Code Section 17-23-175(A)(1);
- (2) an audio and visual recording of the statement has been preserved by electronic means, pursuant to S.C. Code Section 17-23-175(A)(2);

(3) The child is expected to testify at trial and is subject to cross-examination on the elements of the offense and the making of the out-of-court statement(s), pursuant to S.C. Code Section 17-23-175(A)(3).

The State contends that the totality of the circumstances surrounding the making of the statement(s) provides particularized guarantees of trustworthiness. The State requests an *in-camera* review by the Court for consideration of the following factors in support of the admission of said evidence pursuant to S.C. Code Section 17-23-175 (B):

- (1) whether the statement was elicited by leading questions;
- (2) whether the interviewer has been trained in conducting investigative interviews of children;
- (3) whether the statement contains a detailed account of the offense;
- (4) whether the statement has internal coherence; and
- (5) sworn testimony of any participant which may be determined as necessary by the Court.

For the foregoing reasons, the State moves to introduce evidence and/or testimony of the out-of-court-statement(s) made by the child concerning details of the alleged criminal offense(s) in this case. Furthermore, the State contends that upon consideration of the totality of the circumstances, that said statement(s) possess particularized guarantees of trustworthiness sufficient for admissibility within the provisions of S.C. Code Section 17-23-175.

Respectfully submitted,

____ Circuit Solicitor's Office

This ____ day of _____, 200____

Motion for Unrecorded Statement

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS

COUNTY OF)
)
 STATE OF SOUTH CAROLINA) #___ - ___ - ___ - ___
)
 vs.) **MOTION FOR ADMISSION**
) **OF OUT-OF-COURT STATEMENT**
) **OF CHILD PURSUANT TO**
 _____) **S.C. CODE SECTION 17-23-175 (Unrecorded)**
DEFENDANT

PLEASE TAKE NOTICE that the undersigned Attorney for the State will move before this Honorable Court at a date to be determined pursuant to S.C. Code Section 17-23-175 for admission of out-of-court statement(s) made by the victim/witness in the above-captioned case, to wit:

_____, date of birth _____.
 _____ S.C. Code Section 17-23-175 was enacted as part of the Sex Offender Accountability and Protection of Minors Act of 2006.

Statement of Law

An out-of-court statement by a child under the age of twelve is admissible in a General Sessions Court proceeding upon satisfaction of the provisions set forth in S.C. Code Section 17-23-175 and a finding by the Court that the statement(s) provides “particularized guarantees of trustworthiness.” In the present case, the victim/witness was under the age of twelve years at the time of the making of said statement(s) or functioned cognitively, adaptively, or developmentally under the age of twelve at the time of the making of the statement(s). Furthermore, the defendant is currently charged with an offense which would require registry pursuant to the provisions of Article 7, Chapter 3, Title 23 (South Carolina sex offender registry).

Evidence to be offered by the State pursuant to S.C. Code Section 17-23-175(F) includes electronically unrecorded statements made by the child victim/witness to the following persons in relation to the above-captioned case:

The State offers the following facts in support of the admission of the aforementioned out-of-court statement(s):

- (1) the statement was given in response to questioning conducted during an investigative interview of the child, pursuant to S.C. Code Section 17-23-175(A)(1);
- (2) although an audio and visual recording of the statement was not preserved by electronic means, S.C. Code Section 17-25-175(A)(2) provides an exception for this requirement as set forth in Section 17-23-175(F);
- (3) the child is expected to testify at trial and is subject to cross-examination on the elements of the offense and the making of the out-of-court statement(s), pursuant to S.C. Code Section 17-23-175(A)(3).

The State contends that the totality of the circumstances surrounding the making of the statement(s) provides particularized guarantees of trustworthiness. Furthermore, the electronically unrecorded

statement(s) were made to a professional in his or her professional capacity by the child victim/witness regarding an act of sexual assault or physical abuse.

The State requests an *in-camera* review by the Court for consideration of the following factors in support of the admission of said evidence pursuant to S.C. Code Section 17-23-175 (F):

- (1) the necessary visual and audio recording equipment was unavailable;
- (2) the circumstances surrounding the making of the statement;
- (3) the relationship of the professional and the child; and
- (4) whether the statement possesses particularized guarantees of trustworthiness as set forth in Section 17-23-175(B), including but not limited to: whether the statement was elicited by leading questions; whether the interviewer has been trained in conducting investigative interviews of children; whether the statement contains a detailed account of the offense; whether the statement has internal coherence; and the sworn testimony of any participant which may be determined as necessary by the Court.

For the foregoing reasons, the State moves to introduce evidence and/or testimony of the out-of-court-statement(s) made by the child concerning details of the alleged criminal offense(s) in this case. Furthermore, the State contends that upon consideration of the totality of the circumstances, that said statements possess particularized guarantees of trustworthiness sufficient for admissibility within the provisions of S.C. Code Section 17-23-175.

Respectfully submitted,

_____ Circuit Solicitor's Office

This ____ day of _____, 200__

Appendix Five

Sample Direct Examination of Experts

The following sample examinations were provided by Suzanne Mayes, Child Abuse Specialist with the South Carolina Commission on Prosecution Coordination.

Direct Exam of Forensic Interviewer

Qualification of the expert

Request and review the expert's resume in advance.

1. Educational background and training
2. Employment background
 - a. Where are you employed?
 - b. What services do you provide?
3. Courses, seminars, and other training in field of forensic interviews
4. Training or teaching experience
5. Professional organizations or affiliations related to children's issues
6. Amount of experience conducting forensic interviews with children?
7. Number of years conducting forensic interviews? Estimated number of interviews conducted?
8. Has the witness been previously qualified as an expert in the field of forensic interviewing and has the witness provided testimony in court? On how many such occasions?

Offer as an expert in the field of "forensic interviewing and child abuse assessment." Remember State v. Schumpert, 435 S.E.2d 859 (S.C. 1993): "Defects in the amount and quality of education and experience go to the weight of the expert's testimony and not its admissibility."

General issues

1. What is a “forensic interview?”
2. How are forensic interviews conducted to assess possible child abuse?
3. What, if any, rules or guidelines are set for the interview?
4. Is the child informed of these guidelines?
5. Are the child’s parents or guardians present for the interview? Why or why not?
6. Where is the interview conducted?
7. Who may be allowed to observe the interview? In what manner?
8. What, if any, measures are used to assess the child’s level of competency?
9. Why is this important?
10. Is the child’s family and/or social history obtained? Why may this be important to the forensic interview and assessment?
11. Do you obtain a medical history? Why may this be important to the forensic interview?
12. What type of questioning format is used in the forensic interview? (i.e., non-leading, non-suggestive questions) Why are these safeguards used?
13. When assessing child physical or sexual abuse, how do you determine the child’s knowledge of his or her anatomy?

Delayed reporting

1. What is meant by the term delayed reporting or delayed disclosure?
2. In your training and experience, how common is delayed reporting among victims of child sexual abuse?
3. What factors commonly play a role in a child’s delayed reporting?
4. During a forensic interview, do children necessarily disclose all details of past abuse? Why or why not?

Direct Examination of Counselor or Psychologist

Qualification of the expert

Request and review the expert's resume in advance.

1. Background and training
2. Type of professional licensing or practice (e.g., LISW, MSW, psychotherapy).
 - a. Where are you employed?
 - b. What specific types of services do you provide?
3. Courses, seminars, and other training in child abuse, sexual assault, or incest.
4. Training or teaching experience.
5. Professional organizations, affiliations, publications, speaking engagements.
6. Experience counseling victims of sexual assault (primarily child victims or adult survivors of child sexual abuse).
7. Number of years in practice; estimated number of patients.
8. Previous court testimony and qualification as an expert witness.

Offer as an expert in the field of "child sexual abuse counseling and trauma recovery" or "child sexual abuse treatment." Remember State v. Schumpert, 435 S.E.2d 859 (S.C. 1993): "Defects in the amount and quality of education and experience go to the weight of the expert's testimony and not its admissibility."

Delayed disclosure generally

Caveat: Because case law is not clear as to whether the expert can specifically identify the perpetrator, it is best for the expert to avoid calling the perpetrator by name or identifying labels such as "grandpa." The expert is allowed, however, to generally discuss the dynamics present when a perpetrator is a family member or authority figure.

1. What do child abuse professionals mean by the terms "delayed disclosure" or "delayed reporting?"
2. In your experience, how common is this among victims of child sexual abuse?
3. What factors commonly play a role in delayed disclosure?
4. Can you explain family dynamics that may affect a child's delay in reporting sexual abuse?
 - a. when the perpetrator is within the family or present in the home
 - b. when the perpetrator has a strong influence on child or the family
 - c. when the perpetrator is abusive, domineering, controlling
 - d. when the non-offending parent is passive
 - e. when the perpetrator is an authority figure or loved by child
 - f. the child wishes to protect others, such as grandmother, mom, siblings, or anyone she
 - g. perceives as being harmed by the revelation
 - h. when the child has strong desire to keep the family intact
 - i. when the perpetrator has threatened the child or a family member

- j. child's own natural feelings of guilt, shame, fear, and not being believed
5. What effect, if any, does it have when the perpetrator is a family member (or lives in the home)? Are you more or less likely to see delayed disclosure in these types of situations?
6. Based upon your professional experience, can you give us some examples of the different time spans you have seen concerning the issue of delayed disclosure? (i.e., cases spanning months, years, or into adulthood before disclosure, and cases with adult incest survivors where multi-generational sexual abuse may have occurred without any previous disclosure).

Case-specific delayed disclosure

1. In your expert opinion, (or "to a reasonable degree of certainty in your field of expertise"), did any of the factors you have previously discussed play a role in the victim's delayed reporting?
2. Based on your training and experience, was the victim's delayed reporting consistent or inconsistent with her history of sexual abuse?
3. *Optional* — What experiences, if any, have you had with adult victims who later disclose a history of childhood sexual abuse?
4. Hypothetically, if the perpetrator is a male, dominant authority figure (or residing in the home), would delayed disclosure be consistent or inconsistent with sexual abuse?
5. What, if any, role would additional factors such as physical or emotional abuse by the perpetrator play in delayed disclosure?
6. What factors may ultimately encourage a child to reveal sexual abuse? (e.g., a trusted relationship, change in environment, sense of security, age development, fear that sibling will be abused, or fear that the abuse will escalate).
7. What type of support system should be in place to allow a child to disclose sexual abuse?

Trauma symptoms generally

Caveat: The proper language for the expert to use is "consistent with," instead of giving an outright conclusion regarding sexual abuse or post-traumatic stress disorder. See State v. Morgan, 485 S.E.2d 112 (S.C. Ct. App. 1997).

1. When was (victim) first referred to you for counseling?
2. For what purpose have you treated the victim?
3. What are (victim's) treatment goals?
4. How has he/she progressed?
5. Why may symptoms of trauma follow sexual abuse or sexual assault?
6. What, in general, are recognized symptoms of trauma following an act of sexual abuse or sexual assault?

7. What, if any, trauma symptoms did (victim) exhibit? (Expert may rely on child's given history as underlying basis of opinion. Rule 703, SCRE).
8. How does counseling help to address these symptoms?
9. In your expert opinion, are (victim's) symptoms of trauma consistent or inconsistent with his/her history of sexual abuse?

Other related issues

These sample questions may be helpful in cases of ongoing, chronic sexual abuse where the victim has seemingly become passive to the abuse. This type of behavioral response is often termed "Child Sexual Abuse Accommodation Syndrome."

1. In your expert opinion, and based upon your professional experiences, can you tell us why children may become "passive" to sexual abuse?
2. Can you tell us what factors may play a role in a child's acceptance of abuse? (e.g., a desire to maintain other family relationships, love for the perpetrator, fear or intimidation)
3. Can you tell us, based on your professional experience, whether this is a common reaction to child sexual abuse?
4. And can you tell us, in your expert opinion, whether this is consistent or inconsistent with the victim's history of child sexual abuse?

Nurse: Sexual Assault Examination

General Information

1. Please give us information concerning your current occupation and educational background.
2. How long have you worked as a nurse?
3. Were you working in the _____ hospital emergency room on or about (date)?
4. During this time, can you tell us whether or not you had the opportunity to treat a patient by the name of _____?
5. Did you obtain some general information concerning this patient?
6. What is meant be triage or initial assessment at the ER? Who was the triage nurse?
7. Do you have with you any notes you made concerning the initial assessment of the patient?
8. What, if any, notations did you make concerning symptoms or injury to the patient?
9. What is the protocol for doctors and nurses when treating a patient for sexual assault?
10. Is there a form that is used as part of the protocol? Did you use that protocol form in this case?

11. When treating a patient, is gathering certain information about the past or present symptoms necessary for medical diagnosis and treatment? Is obtaining information concerning the cause of an injury or event necessary for purposes of medical diagnosis and treatment?
12. How might knowing the circumstances of the event aid the nurse or physician in diagnosing or treating a patient? Specifically, when a patient is being treated for an alleged sexual assault? (*i.e., whether or not to treat for transmittal of an STD, locations of physical injury, infections*).
13. Is it necessary for purposes of medical diagnosis and treatment to learn whether or not a patient may have been exposed to another person's bodily fluids? Why?
14. Is it necessary for purposes of medical diagnosis and treatment to learn the locations of possible injury to the patient's body?
15. Was such information or patient history obtained by yourself during your examination of victim for purposes of medical diagnosis and treatment?
16. How is such information documented? (Refer to sexual assault evidence collection protocol).
17. Do you have those records with you? Whose handwriting was used to complete the form?

Seek admission of relevant patient history, including details concerning the nature of the assault, type of sexual contact, and location(s) of the injuries, pursuant to SCRE Rule 803(4) as an exception to the hearsay rule. Rule 803(4) allows that "statements made for the purposes of medical diagnosis and treatment and describing medical history, past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source insofar as reasonably pertinent to medical diagnosis and treatment" are admissible as an exception to hearsay.

Sexual Assault Examination & Evidence Collection

1. What, if anything, did victim report to you concerning possible locations of injury? (*i.e., genital contact, penetration*)
2. Did the patient report whether or not a condom was used by the assailant?
3. Did you document your observations concerning the victim's physical appearance and condition? What, if any, notation did you make concerning victim's outward appearance?
4. What, if any, notation did you make concerning victim's emotional state?
5. I'm going to show you an item and ask you whether or not you can identify this item. (Show witness the Sexual Assault Examination Kit). What is it? Can you tell us whether or not this evidence collection kit is used routinely as part of sexual assault examinations at your hospital? (Mark for ID). Can you tell us whether or not such an evidence collection kit was used during the examination of victim on (date)? (Offer into Evidence).
6. How is the Sexual Assault Protocol Exam used as a means of collecting possible evidence? Specifically, what type of evidence is obtained by the nurse or doctor during the examination? Are there individual packets in the kit that you use to collect possible evidence?
7. Were victim's clothing collected as part of the sexual assault examination? (Mark for ID, if needed)

8. Was a saliva sample collected from victim? (i.e., collected from victim for possible comparison analysis to suspect at later date)
9. Was a blood sample collected from victim? (i.e., collected from victim for possible comparison analysis to suspect at later date)
10. Were fingernail scrapings collected from victim? (Mark for ID, if needed)
11. Were “suspected semen” samples collected from areas of the victim’s body? How was that done? (Mark for ID, if needed)
12. Were pubic hair combings taken from victim? How is it done? (Mark for ID, if needed)
13. Were “known pubic hairs” collected from victim? (i.e., collected from victim for possible comparison analysis to suspect at later date)
14. Were “known head hairs” collected from victim? (i.e., collected from victim for possible comparison analysis to suspect at later date)
15. Show witness the Sexual Assault Kit packets pertaining to victim — which may be identified by SLED LAB # _____. (i.e., vaginal swabs, pubic hair combings, undergarments).
16. Does the nurse/physician recognize his/her signature on the individual packets or items? What was your role, if any, in the collection of these items of possible evidence that you just mentioned? (usually the rape kit protocol nurse examiner).
17. In addition, are other methods of evidence collection performed by the physician during the sexual assault examination? (i.e., collection of vaginal swabs and slides).
18. What evidence does the physician collect?
19. And that is done during which part of the examination? (i.e., pelvic examination).
20. As the nurse examiner, do you normally remain present for that part of the exam? (Show witness the vaginal swabs for ID by the nurse or physician.)
21. Can you tell us the name of the physician who assisted you in the sexual assault examination of (victim)? And can you tell us whether or not a pelvic exam or vaginal exam was done while treating (victim)? Who performed the pelvic examination? And do you know whether or not evidence was collected during the pelvic exam of (victim)?
22. What was your role following the collection of that evidence? Did that include the vaginal swabs being sealed inside the kit? How was the evidence sealed? How was the integrity of the evidence maintained? Who is responsible for sealing and securing the kit once all evidence has been obtained? How is that done?
23. Once the kit was sealed, who did you turn it over to? (i.e., law enforcement officer). Can you tell us whether or not, the kit remained sealed throughout this time? (Mark for ID or Offer into Evidence any chain of custody forms she signed.)

Physical Examination

1. How do you document the type and location of possible physical injury to a patient during the examination? Does the protocol form have a specific place to document such injuries? In what way is it documented? (i.e., use of anatomical diagrams)
2. Referring to your notes, can you describe to us (or diagram for us) the specific type and location of physical injuries you observed concerning victim?
3. Can you diagram this for us in the same way it is reflected in your medical records? Is this courtroom diagram a true and accurate representation of your original notes? Offer diagram into evidence.

Physician: Sexual Assault Examination

General Information

1. Can you provide us with information concerning your education and current occupation?
2. Where are you currently practicing medicine and in what capacity?
3. How long have you been practicing medicine? In which specific field of medicine have you received board certification? (Offer as Expert)
4. Were you working in the ER of _____ Hospital on (date)?
5. What role did you play in the sexual assault examination and collection of evidence concerning victim?
6. Do you have your records concerning victim's sexual assault evidence collection exam?
7. Whose handwriting was used to document the pelvic examination?
8. What time did you complete your portion of the examination?

Pelvic Examination/Notation of Injury

1. What specific areas of the body did you examine?
2. Did you note any form of possible injury or trauma?
3. To what part(s) of the body did you observe possible injury or trauma?
4. In your opinion, can you tell us whether or not, that type of injury and/or trauma is consistent with a sexual assault?
5. How may such an injury occur as a result of sexual assault or trauma?
6. Can you read for us exactly what you noted in your records concerning the injury or trauma you observed during the exam? (i.e., witness may read from pelvic exam section of protocol form).
7. Does the protocol form contain a diagram in order for you to document your observations?
8. Using this courtroom diagram, can you show us exactly what you noted concerning the location of injury to victim?
9. Is this diagram a true and accurate representation your records? (Offer diagram into evidence).

Collection of Evidence & Chain of Custody

1. What role did you perform in collecting possible evidence from the patient's body?
2. What type of evidence is collected? What tools are provided in the evidence collection kit for obtaining such evidence? (i.e., vaginal swabs).
3. And describe to us how you collect such evidence from the patient during the examination?
4. Did you collect vaginal swabs from victim?
5. Show witness the packet(s) of swabs which have been analyzed by SLED. Do you recognize these items and how so?
6. Is your own writing (or nurse's writing) seen anywhere? (Mark for ID).
7. Confirm that swabs were sealed and given to nurse to be sealed with the rape kit evidence collection box.

Medical Expert Testimony on Findings in Cases of Sexual Assault

The following examples include some of the most frequently posed questions for medical experts.

Qualifications

1. Background and training.
2. Specific medical training / pediatric training (residency and internship).
3. Special training concerning child sexual assault examinations and years of experience specifically in this area.
4. Previous qualifications in court as an expert.

General discussion

1. What is the hymen?
2. Does it normally have an opening?
3. How does it normally allow for penetration?
4. What are some common myths or misconceptions about the hymen? (i.e., myth that hymen is “broken” or no longer intact after first sexual intercourse.)

Cases with medical findings

1. Did you have an opportunity to examine (victim)?
2. What was the date of the exam?
3. What type of exam was performed and for what purpose? (chronic vs. rape kit).
4. How is the examination performed?
5. What are the specific areas of the anatomy that you examine?
6. *Optional* – What is a colposcope? Was it used in your exam? How did the colposcope aid in your examination?
7. What were your findings during (victim’s) exam? Please describe your findings.
8. How does this differ from a “normal” exam in a child?

9. *Optional* – Could you draw us a diagram to depict your findings, as well as a diagram of how a normal exam would appear in a child?
10. If findings were “consistent with” or “diagnostic of” sexual assault:
 - a. In your expert opinion (or to a “reasonable degree of medical certainty”), can you tell us whether or not these findings are consistent with a penetrating injury?
 - b. And would that type of penetrating injury be consistent with this child’s medical history of sexual assault?
 - c. Doctor, would you always expect to find evidence of trauma following a sexual assault? Why or why not? (Expert may want to offer statistical data concerning the infrequency of physical findings following sexual assault).
 - d. *Optional* – Do you have an opinion as to whether or not this was repeated/chronic penetration?
11. *Optional Questions for Re-Direct:* Make sure you have addressed these issues with the expert in advance.
 - a. Would this type of injury be consistent with masturbation or self-injury? Why or why not?
 - b. Would this type of injury be consistent with a play injury or sports injury? Why or why not?

Cases where the child has a “normal” medical exam

1. Would you always expect to find evidence of trauma following sexual assault? Why or why not?
2. How quickly may an injury begin to heal? (This question is tricky and should only be asked depending on circumstances of the case).
3. Does a penetrating injury necessarily leave scarring or tears? Why or why not? (Expert may have statistical data which can be used here).
4. In fact, could a normal exam still be consistent with (victim’s) medical history of sexual assault? Please explain.
5. *Optional* — How may a child confuse attempted penetration and actual penetration?

Cases with “rape kit” exams

Most rape kits are performed in emergency rooms by physicians with limited experience with child sexual assault exams. You may not want to offer the doctor as an expert in child sexual assault examinations unless he or she actually has the requisite specialized training. Instead, you may choose to offer the witness as an expert in emergency medicine, pediatrics, or family medicine.

1. What is the purpose of a “rape kit” examination? (i.e., mainly looking for forensic or serological evidence following assault).
2. What was the date and time of this examination?
3. Establish what factors may compromise the ability to identify serological evidence:
 - a. If the child has bathed
 - b. If the child has gone to the bathroom
 - c. If the child has changed clothes
 - d. If there was a delay in getting the child to the hospital
4. Establish that the likelihood of finding semen is greatly reduced if ejaculation did not occur. (If the victim does not describe ejaculation or if the act was interrupted, this point needs to be made earlier during the victim’s testimony).
5. If offering evidence of semen, hair, or blood following a rape kit exam, make sure to establish a proper chain of custody through the physician or nurse.

Key points concerning “normal” exams

The vaginal area heals quickly.

The time lapse between the sexual assault and the date of the exam may be significant.

There will not always be physical evidence of sexual abuse, especially with digital penetration, attempted penetration, and cases of limited (non-chronic) sexual assault.

A child may confuse penetration of the vulva with penetration of the vagina.

Fondling of the external genitalia and/or oral sex does not usually result in trauma (lacerations, tears, or abrasions).

Physical evidence of sexual assault consistent with anal penetration is rarely found. The use of statistics by the medical expert may be effective. Other factors may explain the lack of physical findings. Conclusive evidence of trauma is rare even in cases of chronic anal penetration.

DNA Expert

1. Discuss with the expert his or her background, training, experience, and the general acceptance of DNA science and comparison analysis in the scientific community. [Offer witness as an expert in the field of DNA analysis or statistical comparison analysis of DNA].
2. What is meant by the term “Deoxyribonucleic Acid?”
3. What is unique about its components between human individuals?
4. How is it identified and studied for scientific/forensic purposes?
5. Do you perform DNA Analysis at SLED? (Type of scientifically recognized DNA Analysis, e.g., “RFLP”)
6. How are samples received by your department for analysis?
7. From which specific types of human body fluids or tissues can DNA samples be obtained?
8. In this particular case, SLED Lab # _____, were you requested to perform DNA analysis?
9. What specific fluids/samples were submitted in this case from the victim (rape kit, clothing)?
10. Was a suspect kit also submitted to your lab for comparison analysis?
 - a. Previous testimony should already have established that the suspect kit includes known samples taken directly from the defendant).
 - b. You must establish chain of custody prior to the DNA expert’s testimony.
11. What is meant by the testing procedure of “comparison analysis?”
12. Did you perform comparison analysis tests between these two samples? (The “known suspect sample” and the evidence taken from the victim or crime scene – rape kit, clothes, etc.).
13. Were you able to identify DNA patterns in either sample?
14. How is this analysis performed?
15. Were you then able to compare the DNA patterns of the two different samples?
16. What were the results of this comparison analysis?
 - a. Probability match of the DNA strand patterns found
 - b. Number of strands compared (out of 7)
17. What is the significance of these statistical calculations? (The calculations reflect the frequency at which such DNA patterns may randomly occur among the general population).
 - a. Can you state this statistical calculation to a reasonable degree of scientific certainty?

- b. Is this method of analysis generally accepted among the scientific community?
18. So, your expert testimony is that the defendant's known DNA sample is identical to (or "consistent with") the evidence taken from the (victim, crime scene)?

And that such a match would only occur in the general population among one in every _____ number of persons

Appendix Six:

Sample Protocol and Interagency Agreement

The following protocol and interagency agreement were provided by the Richland County multi-disciplinary team. The protocol is the latest version of a modified version of a protocol originally written by Victor Vieth for use in a rural Minnesota county. The protocol and interagency agreement are presented here to demonstrate the variety of issues that can be addressed in such documents and to provide a starting point for local teams when drafting their own agreements. The protocol is reprinted with the permission of the authors.

**Team Investigative Protocol
of the
Richland County Multidisciplinary Child Abuse Response Team (MDT)**

The Mission of this MDT is to ensure coordinated investigations and collaborative action plans addressing suspected child abuse and neglect.

Child-First Doctrine

This MDT recognizes and shall adhere to the Child-First Doctrine, which states that the child is our first priority, not the family, the courts, the case, or any other agenda.

Member Agencies

This MDT consists of the following agencies:

- Richland County Sheriff's Department
- Columbia Police Department
- Forest Acres Police Department
- Irmo Police Department
- Fifth Judicial Circuit Solicitor's Office
- Richland County Department of Social Services
- Assessment and Resource Center

Non-discrimination

This MDT will carry out its mission equitably and fairly without regard to race, gender, age, sexual orientation, religion, disability or ethnicity.

Confidentiality

This MDT and their representatives agree that information pertaining to children and families will be held in the strictest confidence. Information may be shared outside the team only insofar as it is needed to properly investigate a case, develop a case plan or carry out the treatment or dispositional recommendations of the team.

Protocol

1. Agency Notification

Upon receipt of a complaint of child abuse:

- A. Law Enforcement (LE) shall notify Child Protective Services (CPS) in a timely manner, considering the safety of the child and the integrity of the investigation.
- B. CPS shall notify LE within 24 hours of all reports alleging a violation of criminal law or if the safety of a child is in question, as required by law.

2. Investigation and Assessments

Each member Law Enforcement agency will assign all reports of criminal child abuse or neglect to its appropriate major crimes unit.

Richland County Department of Social Services (RCDSS) will assign an appropriately trained CPS worker to each case of suspected child maltreatment.

The assigned agents will establish and maintain communication with one another to coordinate their respective investigations.

3. Interviewing of Children

A. The Minimal Facts Interview

The purpose of this section is to provide guidance to first responders regarding the preliminary questioning of children.

The first concern of any investigation must be the safety of the child. Some children will need to be questioned immediately in the field in order to assess the risk of imminent danger and comply with CPS mandates. In order to reduce the risks associated with

repeated questioning, field interviewers will conduct only a “Minimal Facts Interview” (MFI).

Do not ask why the abuse occurred as it may convey a blaming tone to the child. As developmentally and otherwise appropriate, the MFI may include:

1. What happened?
2. Where did it happen? Check for multiple jurisdictions.
3. When did it happen?
4. Who is the alleged perpetrator?
5. Are there witnesses, other victims, or other perpetrators?

The first responder should also consider what steps are necessary to ensure the safety of the child and other potential victims to whom the perpetrator has access, and whether immediate medical attention is necessary.

The MFI may be modified, or even omitted according to the situation and the first responder’s judgment.

The forensic interview will be conducted with any child under the age of 12 at a Children’s Advocacy Center (CAC), such as the Assessment and Resource Center (ARC). The forensic interview of a child 12 or older will be conducted by the most appropriate MDT member.

Since all investigations differ, the use of the MFI must be flexible, permitting the investigator to use professional judgment. For example, if the child volunteers detailed information, that information should be documented. The documentation should include the circumstances under which the child made the disclosure. If the child does not volunteer information, questioning should be avoided.

“Minimal Facts” should be obtained from other sources whenever possible.

B. Interviewer qualifications and interview format

All child forensic interviews will be conducted by specially trained child abuse forensic interviewers. In all cases, interviewers will conform to nationally accepted standards of best practice. Specifically, this MDT recognizes the APSAC Practice Guidelines and Code of Ethics, and guidelines set forth by the National Children’s Alliance (NCA). In addition we adhere to the interview principles set forth in Finding Words South Carolina (FWSC). We further recognize the evolving nature of best practice and will continue to adapt to advances in the field.

C. Interview Setting

Children under 12 will be interviewed at the ARC or another CAC.

A verbal child of any age may be referred for interview at the ARC or another CAC.

In all cases, interviews conducted at the ARC will be video-recorded. The interviewing agency will notify the respective investigators in advance of the date, place, and time of said interview. Investigators will attend, observe and participate in the interview via closed circuit television whenever possible. Copies of the interview on DVD or VHS will be made available to LE, the solicitor or CPS as necessary.

4. Medical Response

Children with suspected child abuse or neglect will receive a medical assessment to be conducted at the ARC or another CAC, unless deemed unnecessary by a specially trained medical professional. This medical assessment will include a child’s medical history with

a review of systems and a comprehensive and developmentally age appropriate physical examination, assessing the child as a whole. The ARC medical provider will coordinate referrals for medical treatment of any conditions discovered during the ARC evaluations, but will not provide continuity of care.

In situations of acute sexual assault, defined as the last suspected incident occurring less than or equal to 72 hours, patients will be evaluated at the Emergency Department of Palmetto Health Richland. ER medical providers are encouraged to seek consultation from ARC medical provider.

Any MDT member can seek consultation with the ARC medical provider in any case.

5. Interviews of others

A. LE investigators will conduct all interrogations of suspected perpetrators. The CPS investigator may be present at the discretion of LE. All interrogators will have received specialized training in suspect interrogation.

B. The LE investigator will be responsible for explaining criminal implications of the investigation, including any possible charges and Miranda warnings, if necessary.

C. Interviews of other adults (e.g., witnesses, collateral contacts) will be conducted as deemed appropriate by the MDT.

6. Removal of Child

A. Only a LE officer may remove a child without a court order. The officer may consult and should consider the recommendations of the CPS worker.

B. Removal of the child should occur only if the alleged perpetrator cannot be removed from the child's home or if the removal of the child, rather than the perpetrator, is in the child's best interest.

C. RCDSS will determine the appropriate placement of the child based on statutory requirements.

D. Any MDT member may recommend removal of a child as an option in a particular case. Discussion regarding such decisions can be handled at MDT case review staffing or through other communications.

7. Arrest and / or Removal of Alleged Perpetrator

LE investigators are responsible for making decisions regarding arrests. If an arrest is made, the investigator will advise the MDT.

8. Evidence Collection and Maintenance

LE will be responsible for the collection, preservation and storage of all physical evidence collected by LE. CPS may also collect and maintain evidence, such as photographs, to support their agency's determinations. The ARC will maintain the original video-recording of each forensic interview conducted there, as well as any documentation associated with the interview. For every child who receives a medical examination at the ARC, a chart will be maintained in accordance with the standards set forth by USC School of Medicine, Department of Pediatrics and the Palmetto Health Children's Hospital. The colposcopic photos of the ano-genital region will be maintained at the ARC, and will only be released to other medical professionals for medical consultation when needed, or to the SO upon receipt of a court order or properly executed subpoena that specifies release of colposcopic photographs.

All ARC records, photographs and video-recordings will be preserved for a minimum of ten years. Any member of the MDT can request that a record be maintained for a longer period if necessary.

9. Prosecutor Involvement

A. CPS and LE may contact the Solicitor's Office (SO) whenever a legal or procedural question arises in an investigation.

B. Decisions to prosecute or not will be shared by the SO with members of the MDT. The SO may receive questions, requests or other information from any member of the MDT and will respond to these issues as deemed appropriate and necessary.

C. The SO is responsible for preparing children to render court testimony. The SO is further responsible for recognizing the developmental and emotional needs of the child abuse victim, and preparing these witnesses appropriately to reduce the risk of secondary trauma. To this end, the SO shall coordinate whenever necessary with the Solicitor's Victim Advocate, the ARC Victim Advocate and other helping professionals in the best interest of the child abuse victim.

10. Victim Advocate Involvement

A. LEVA

From the time a child abuse investigation begins, the LE agency is responsible for providing the child and family with the services of a Law Enforcement Victim Advocate (LEVA). It is the role of the LEVA to explain the Crime Victims Bill of Rights, Crime Victims Compensation Fund, and ensure understanding of the criminal justice process. The LEVA may be called upon to provide crisis intervention and logistical support as needed.

B. SVA

Once criminal charges are filed, the SO will assign a Solicitor's Victim Advocate (SVA), whose primary role is maintaining communication with the family and notification of upcoming court procedures. The SVA may be involved at the SO's discretion in the preparation of the child witness for court testimony. During trial, the SVA is responsible for the care and comfort of the child victim / witness, and any involved siblings or non-offending caregivers.

Victim advocates are welcome members of the MDT and may elect to attend any case review meetings where they feel their input is warranted, or where they need to make inquiries to fulfill their duties for the child.

11. MDT Meetings/ Case Review

A. The purpose of the MDT meeting is to discuss cases under active investigation.

Through this process, all members of the MDT will have the opportunity to share vital information, discuss issues, identify problems and maintain case tracking. MDT members will remain mindful of the laws of confidentiality which govern the release of medical or mental health information. This information can and will be shared as provided for by federal and state law which requires mandated reporting of information relevant to suspected child abuse. Clinical information which need not be shared to further a child abuse investigation will be treated as confidential and protected, and not be shared without the expressed consent to release by the child's guardian.

B. The MDT will meet every third Tuesday at 2:30 p.m. Location will rotate among the agencies. Cases which are particularly complex or require urgent discussion may be staffed at any time as needed.

C. Meetings will be held if any two of the following agencies are represented:

1. LE
2. CPS / DSS
3. SO
4. ARC

Responsible individuals involved in case investigations and evaluations will attend the initial review of a case. In the event that the investigator can not attend he/she will send an informed representative in their place. It is the responsibility of the case investigators themselves to keep the MDT informed and updated.

There will be occasion when another professional – e.g., therapist from another agency, school personnel – will have relevant information or concerns to share with the MDT.

When MDT representatives with specific case responsibilities wish to include such professionals, they may extend the invitation and inform the MDT coordinator. Such parties will only be admitted into discussion for the specific case in question, and after signing the MDT confidentiality agreement. Caution must be exercised in the releasing of information under such circumstances, while recognizing that receipt of information and cooperation in the child's best interest are important goals.

D. The ARC will be responsible for appointing an appropriate MDT coordinator. The MDT Coordinator will be responsible for setting the agenda and facilitating the meeting. Any MDT member may ask for a particular case to be placed on the agenda for discussion. The MDT Coordinator requests case names a week prior to each meeting. The coordinator will document discussion and action plans. Through e-mail or telephonic communication the coordinator will issue specific tasks to the appropriate team members. Agreed upon tasks will be completed and progress updates will be provided by the next scheduled MDT meeting.

E. Cases under review will remain active on the agenda until CPS and LE have made their disposition. SO will update the MDT on prosecution outcomes.

12. Mental Health Treatment of Child Victims

A. Under ordinary circumstances, abuse-related therapy shall not commence until the child's forensic interviewing has been completed. It is the express view of this team that caution must be exercised to avoid labeling a child a "victim" without adequate basis.

B. Suspected child abuse victims may require crisis intervention or other mental health response prior to the completion of forensic interviews. Under such circumstances, the role of the mental health therapist must not be confused with the role of a forensic evaluator. A forensic interviewer of a child cannot also serve the same child as a therapist.

C. To minimize trauma associated with multiple disclosures and to enhance coordination of the investigation, the ARC is the preferred mental health provider for child victims of abuse and neglect. When the ARC is not available, or treatment at the ARC is contraindicated, members of this MDT will make appropriate referrals.

13. Grievances

Any conflicts arising pursuant to the process outlined in this protocol shall be dealt with in the following manner:

1. Conflicting professionals shall meet and discuss the conflict in an effort to resolve it.
2. If the conflict cannot be resolved in this manner, the professionals' immediate superiors will become involved and the matter will be discussed at a meeting with those team members present.

14. Protocol Revisions

A formal review of this protocol will be conducted at minimum every three years. All core agencies must meet to discuss any proposed changes. At this meeting, a vote by the agency representatives will be taken to determine the implementation. This protocol may be modified to: a) conform to existing or new statutes, rules, regulations or departmental policies which may conflict with any provisions of this protocol; b) better meet the needs of children and the provision of child abuse related services; c) improve the procedures set forth in this protocol; d) add or delete agencies as parties to this protocol; or e) such other purpose as the parties may agree.

Sheriff
Richland County

Chief
Columbia Police Department

Chief
Forest Acres Police Department

Chief
Irmo Police Department

Appendix Seven:

Drug Endangered Children's Protocol

South Carolina Drug Endangered Children Protocol
(SCDEC Protocol)

The SCDEC Protocol addresses a narrow but dangerous category of cases: The investigation of a home or other structure where children are exposed to the manufacture of methamphetamine.⁷ In all such cases, procedures must be in place to protect children exposed to harmful substances and to ensure that evidence is collected in a forensically sound manner. This protocol addresses both of these goals.

Part One: Pre-Response

Law Enforcement

1. **Contact the Drug Enforcement Administration.** Prior to any operational briefing, contact the Drug Enforcement Administration (DEA).⁸
2. **Contact a CPS worker.** Prior to the operational briefing, contact a CPS worker who is certified in the SCDEC Protocol. The CPS worker should attend the operational briefing.
3. **Obtain search warrants.** When drafting warrants, keep in mind the need to search for evidence of danger to children (chemicals in cupboards and other containers within the reach of children; sexually explicit material that is commonly found among methamphetamine addicts).

Child Protective Services (CPS)

1. **Gather clothing for children.** Create a clothes bank from local merchants or other organizations that are able to provide clothing for children (consider also asking for donations of blankets, stuffed animals, books, and games). Implement a system for taking the clothes and comfort items to the scene to replace contaminated items.
2. **Begin identifying potential foster care placements.** Maintain information for foster parents on caring for children who have been exposed to a methamphetamine lab.

Fire Department/Emergency Medical Services

Plan decontamination procedure. Work with local law enforcement to prepare a method of decontaminating any person located at the site of a lab.

⁷ Although inspired by the methamphetamine problem in our community, this protocol could be applied to any situation involving children's exposure to hazardous chemicals.

⁸ DEA must be informed of an interdiction in order to use federal contractors to clean up meth sites. DEA also must submit a detailed report of any meth lab interdiction/cleanup to the entity mandated to collect that data.

Part Two: Responding at the Scene

Law Enforcement

1. **Take the lead in securing the scene.** In addition to securing the scene for evidence collection purposes, LE must secure the scene to protect all people present. CPS and Fire Department/EMS (FD/EMS) responders should not approach or enter buildings until the premises are declared safe by law enforcement.
2. **Notify CPS immediately if children are at the scene.** If CPS has not been involved in the pre-operational briefing, notify CPS immediately if children are found at a lab site. CPS also should be notified if children are not at the scene, but there is reason to believe: (a) children have been exposed to chemicals or drugs from the lab; and (b) a parent or guardian allowed the children to be at the lab site.
3. **Protect any children at the scene.** One officer should have primary responsibility for ensuring the safety of children at the scene. This officer should:
 - (a) Take Emergency Protective Custody (EPC) of the child. A case-by-case determination of EPC is necessary, but virtually every child exposed to the manufacture of methamphetamine will be in substantial and imminent danger.
Note: Even if CPS expects to place the child with a relative, it is important to take EPC of every child who is in imminent and substantial danger.
 - (b) Remain with the children until the CPS worker arrives. When a CPS worker has been involved in the pre-operational briefing, the transfer to CPS care can be immediate.
 - (c) If a CPS worker is unable to respond to the scene, the officer should transport the child to a medical facility.
4. **Notify EMS immediately** to evaluate and transport children to medical care when urgent health concerns or evidence of contamination of children are present.
5. **Decontaminate children exposed to toxins.** All children should be decontaminated under the supervision of DEA-certified or hazmat-trained personnel.
 - (a) Special consideration should be given to children's privacy and dignity and children should immediately be provided age-appropriate clothing.
 - (b) Following decontamination, contaminated clothing should be placed in a plastic bag pursuant to evidence collection procedures.
6. **Identify chemicals for purposes of children's health care.** Use Form Two to identify chemicals at the scene. A duplicate of this form (Form Three) should accompany children to the medical examination and should become part of the children's health care records.
7. **Collect evidence.**
 - (a) Photograph or videotape the location. When making a visual record of the location, pay special attention to chemicals and weapons accessible to children (e.g., in or near the kitchen, bedrooms, playrooms).
 - (b) Photograph or videotape the children. Record the general condition of children that would show evidence of abuse, neglect, contamination, or other injury.
 - (c) Measure and record location of chemicals and other items that are dangerous to children.
 - (d) Seize physical evidence pursuant to evidence handling procedures. Likely items include: computers, weapons, chemicals, blister packs, and sexually explicit materials.
Note: Follow appropriate agency protocols and policies concerning the collection, storage, and disposal of hazardous materials.
8. **Interview children.** As soon as possible (usually within 48 hours), conduct a forensic interview of children pursuant to local interviewing protocols. The purpose of this interview is to gather information from children about harms they may have experienced.

Child Protective Services

1. **Attend to children at the scene.** After law enforcement has taken emergency protective custody of any children, the CPS caseworker should assume the primary role with respect to any children at the scene and remain with the children through the medical assessment and until the children are in appropriate placement.
2. **Collect information on children's health history.** Using Form Four, collect health history information about children from parents, children, or other adults available at the scene. This form should become part of the medical record at the facility evaluating the child.

- (a) If a search can be safely conducted, check the facility for children's medication, medical equipment (e.g., nebulizer, glucometer), glasses, contacts, and other equipment. Thoroughly describe all medical equipment on Form Four. In most cases, medications and medical equipment that have been exposed to toxins in a methamphetamine lab will need to be destroyed.
- (b) To the extent possible, obtain a signed release from parents or legal guardians for access to all prior medical records of children.

Accompany children to the medical facility.

- (a) Children who are not in critical condition should be decontaminated at the scene before any transportation to a medical facility.
 - (b) CPS should inform the health care provider of the children's health records, medications, and any health equipment used by the child.
4. **Attend to children not at the scene.** Children who have been exposed to a lab may be at another location at the time of the interdiction. CPS must attend to these children who are not at the scene. In cooperation with law enforcement, CPS should promptly evaluate the safety and well-being of these children. The medical components of this protocol should be followed for any children with significant exposure to a site.

Emergency Medical Services (EMS)

1. For all children who are not obviously critical, perform a field medical assessment consisting of: *vital signs* (temperature, pulse, respirations, blood pressure); and the *pediatric triangle of assessment* (airway, breathing, circulation).
2. Transport any children to the hospital immediately if:
 - (a) The lab is actively manufacturing methamphetamine at the time of the interdiction;
 - (b) There is an explosion at the lab where children are present;
 - (c) The children appear ill; or
 - (d) There are signs of chemical exposure, including:
 - (i) Breathing difficulty or distress, prolonged coughing, wheezing, gagging, dry or sore throat, pain or tightness in chest;
 - (ii) Red, watering, burning eyes;
 - (iii) Burns or a burning sensation on the skin;
 - (iv) Strong smell of ammonia, cat urine, chlorine, or other chemical odors on the children or clothing;
 - (v) Unusual behavior (e.g., very sleepy or difficult to arouse in the daytime, overly stimulated, fidgeting, trembling, agitated).

If there are signs of acute chemical irritation, give first aid immediately, including flushing eyes and skin with water.

Part Three: Medical Assessments

Immediate Care Assessment

All children should be taken to an appropriate medical facility for an immediate care assessment within 4 hours, and not later than 6 hours, of a child's removal from a methamphetamine lab. The facility to be used will depend upon the severity of the medical condition, the urgency of the problem, and the time of day.

An appropriate medical facility includes: (a) a provider affiliated with a regional child advocacy medical assessment center; (b) a local physician trained in the SCDEC Protocol; or (c) an emergency department trained in the SCDEC Protocol.

1. **Review child's medical history.** The physician should receive information from CPS and law enforcement on the *chemicals* to which children may have been exposed and the children's *medical history* (to the extent this is available).
2. **Review of systems** (standard medical review). This review should pay attention to neurological and respiratory status.
3. **Urine toxicology screen.** Collect a urine specimen for toxicology screening ***within 6 hours, and not later than 12 hours***, of the discovery of a child at a lab site.
 - (a) Instruct to report urine toxicology screen at any detectable level.
 - (b) Follow up on all positive urine tox screen with gas chromatography/mass spectroscopy.

- (c) Be sure to document the chain of custody.
 - (d) Instruct to save a portion of the sample for later confirmation of positive test results.
4. **Perform O₂ saturation level.** Consider chest X-ray AP/lateral, if indicated.
 5. If appropriate to the medical facility, follow the steps in the baseline medical assessment.

Baseline Medical Assessment (within 24 to 72 hours)

Within 24 to 72 hours after a child is identified at a lab site, the child should receive a baseline assessment from an appropriate medical provider. An appropriate medical provider is: (a) a provider affiliated with a regional child advocacy medical assessment center; or (b) a local physician trained in the SCDEC Protocol. Prompt medical assessment is warranted due to the risk of toxicological, neurological, respiratory, dermatologic, or other adverse effects of methamphetamine lab exposure, and the high risk of abuse and neglect.

1. **Review child's medical history.**
2. **Perform a complete pediatric physical exam.** Include as much of the Early Periodic Screening, Detection, and Treatment (EPSDT) exam as possible. Pay particular attention to vital signs (temperature, heart/respiratory rate, blood pressure), the *neurological screen* and *respiratory status*.
3. **Conduct the following evaluations:**
 - (a) Liver function tests: AST, ALT, Total Bilirubin and Alkaline Phosphatase.
 - (b) Kidney function tests: BUN and Creatinine.
 - (c) Electrolytes: Sodium, Potassium, Chloride, and Bicarbonate.
 - (d) Complete Blood Count (CBC).
 - (e) Consider lead level (on whole blood).
 - (f) Obtain urinalysis and urine dipstick for blood.
 - (g) Obtain results of urine toxicology screen/confirmatory tests done at immediate care assessment.
4. **Conduct a developmental screen.** This is an initial age- appropriate screen, not a full-scale assessment; may need referral to a pediatric specialist.
5. **Provide a mental health screen,** as clinically indicated. These services require a qualified pediatrician or mental health professional and may require a visit to a separate facility.
6. **Follow-up.** For any positive findings, follow-up with appropriate care as necessary. All children must be provided long-term follow-up care.

Follow-up care

1. **30 day visit.** A visit for initial follow-up care should occur within 30 days of the baseline medical assessment to reevaluate comprehensive health status of the child, identify any latent symptoms, and ensure appropriate and timely follow-up of services. If possible, the visit should be scheduled late in the 30-day time frame for more valid developmental and mental health results. Follow-up on any abnormal test results.
2. **Long-term follow-up.** Long-term follow-up care is designed to monitor physical, emotional, and developmental health; identify possible late developing problems related to the methamphetamine environment; and provide appropriate intervention. At minimum, a pediatric visit is required 12 months after the baseline medical assessment. Children considered to be drug endangered should receive follow-up services a minimum of 18 months after identification.
 - (a) Follow-up of previously identified problems.
 - (b) Perform (EPSDT) comprehensive physical exam and laboratory examination with particular attention to: (1) liver function (repeat panel at 30-day visit only unless abnormal); (2) respiratory function (history of respiratory problems, asthma, recurrent pneumonia, check for clear breath sounds); (3) neurological evaluation.
 - (c) Perform developmental screen.
3. **Developmental and mental health evaluations.** The following services require a child psychologist, qualified mental health professional, or licensed therapist.
 - (a) Perform a full developmental examination using an age-appropriate instrument within 30 days and 12 months after the baseline medical assessment.
 - (b) Perform a mental health evaluation within 30 days and 12 months after the baseline medical assessment.
 - (c) If abnormal findings, schedule referral and intervention with appropriate provider.

Part Four:

Implementing the Protocol

Training and dissemination

1. **Train first responders.** First responders, medical professionals, and CPS should receive in-depth protocol training resulting in SCDEC Protocol certification. Only personnel certified in the SCDEC Protocol may participate on a DEC team.
2. **Train the child protection community.** Pediatricians, judges, foster parents, school personnel, and guardians ad litem should receive general DEC training.
3. **Mail to relevant professionals.** Mail the protocol to all South Carolina hospitals with the request that it be discussed at a staff meeting within the Emergency, Pediatrics, Nursing, and Administration departments.

Protocol review

1. The county DEC team should review all cases of children removed from methamphetamine lab sites. The DEC team should work closely with the local child abuse multi-disciplinary team in conducting these case reviews.
2. A statewide working group will be established to receive feedback on the protocol from counties and make appropriate revisions to the protocol.
3. DEC team certification will be renewed annually.

Explanation of Forms

1. The forms appended to this protocol and are intended to be incorporated as part of the SCDEC Protocol. The forms are:
Form One: Hazards to Children
Form Two: Location of Chemicals (Law Enforcement Copy)
Form Three: Location of Chemicals (Medical Provider Copy)
Form Four: Medical Information
Form Five: Medication
Form Six: Medical Exam Information
2. Forms One and Two are intended to assist law enforcement officers in documenting dangers at the scene posed to children. These forms should become a part of the law enforcement officer's case file.
3. Forms Three through Six are intended to assist medical providers in diagnosing and treating children. These forms should become part of the child's medical record and remain with medical providers.

Acknowledgements

Much of the language in this protocol is taken from the Nebraska CHEM-L Protocol developed under the direction of Dr. Gregg Wright at the University of Nebraska's Center on Children, Families, and the Law. The medical portions of this document were taken from the Kempe Child Protection Team in Denver, Colorado, under the direction of Dr. Kathryn Wells. Additional language was adapted from a model protocol developed by the National Alliance for Drug Endangered Children. We are grateful to these individuals and organizations for granting us permission to borrow liberally from their documents.

Form One: Hazards to Children

This form is for completion by a Haz-Mat Technician or Fire District Employee to document real and potential endangerment to children at locations identified by law enforcement as a possible drug-manufacturing site.

Form Completed By:	Date:
Position:	Time of Arrival:
Haz-Mat Team Affiliation:	Time of Inspection:
Law Enforcement Jurisdiction:	Fire District Incident #
Address or Location:	
Number of Children Present:	Age(s):
Name(s):	

1. Type of structure lab was found in (check all that apply):

Single Family	<input type="checkbox"/>	Shed	<input type="checkbox"/>	Storage Locker	<input type="checkbox"/>	Garage	<input type="checkbox"/>	Apartment	<input type="checkbox"/>
Mobile Home	<input type="checkbox"/>	Hotel/Motel	<input type="checkbox"/>	Business	<input type="checkbox"/>	Condo/Townhome	<input type="checkbox"/>	Motor Home	<input type="checkbox"/>
Other	<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>

2. Describe the general conditions in the residence and location of the lab (manufacturing process):

3. If children were present, describe their potential exposure; to include accessibility to chemicals or hazards:

4. If a fire were to start due to the manufacturing process, within this building, would children be put at additional risk?

5. Locations where chemicals related to the manufacturing process were found (check all that apply):

Kitchen		Laundry Room		Closet		Garage (Attach)		Living/Family Room	
Basement		Vehicles		Bathroom		Garage (Detach)		Attic	
Office/Den		Shed		Refrigerator		Freezer		Storage Space	
Other:									

6.Type of HVAC system (e.g., heat pump, forced air):

7.Are light, air, and sanitation facilities adequate? Explain.

8.Describe location where chemicals and waste products are being disposed of:

9.Fire hazards noted:

10.Other general hazards noted:

Print your name: _____ Title: _____ Phone: _____

Signature: _____ Date: _____

Form Two: Location of Chemicals (Law Enforcement Copy)

	Kitchen	Family Room	Main Bath	Master Bedroom	Master Bath	Child Bedroom	Garage	Dining Room	Other
Ethyl Ether									
Acetone									
Methanol (Heet)									
Coleman Fuel									
Mineral Spirits									
Paint Thinner									
Toluene									
MEK (methyl ethyl ketone)									
Naptha									
Denatured Alcohol									
Isopropyl Alcohol									
Iodine Crystals									
Tincture of Iodine									
Red Phosphorus									
Hydrogen Chloride Gas									
Hydriodic Acid									
Muriatic Acid									
Sulfuric Acid									
Mercuric Chloride									
Sodium Cyanide									
Ephedrine									
Psuedoephedrine									
Chloroform									
Hydrogen Peroxide									
Charcoal Lighter Fluid									
Hypophosphorous acid									
Sodium Chloride (salt)									
Red Devil Lye (sodium hydroxide)									
Anhydrous Ammonia									
Lithium/Sodium Metal									

Form Three: Location of Chemicals (Medical Provider Copy)

Copy information from the Law Enforcement form onto this form to be provided to the physician attending the child.

	Kitchen	Family Room	Main Bath	Master Bedroom	Master Bath	Child Bedroom	Garage	Dining Room	Other
Ethyl Ether									
Acetone									
Methanol (Heet)									
Coleman Fuel									
Mineral Spirits									
Paint Thinner									
Toluene									
MEK (methyl ethyl ketone)									
Naptha									
Denatured Alcohol									
Isopropyl Alcohol									
Iodine Crystals									
Tincture of Iodine									
Red Phosphorus									
Hydrogen Chloride Gas									
Hydriodic Acid									
Muriatic Acid									
Sulfuric Acid									
Mercuric Chloride									
Sodium Cyanide									
Ephedrine									
Psuedoephedrine									
Chloroform									
Hydrogen Peroxide									
Charcoal Lighter Fluid									
Hypophosphorous acid									
Sodium Chloride (salt)									
Red Devil Lye (sodium hydroxide)									
Anhydrous Ammonia									
Lithium/Sodium Metal									

Form Four: Medical Information

The following is a list of important medical information about the child, to be obtained from the parent or guardian, by personnel on scene. The information needs to go with the child to the hospital.

Child's Name:	Date of Birth:
Child's Medical Doctor:	
Child's Dentist:	
Information obtained from:	
Is the child on any medication? <input type="radio"/> Yes <input type="radio"/> No If so, please list medication and dosing:	
Does the child have any medical allergies? <input type="radio"/> Yes <input type="radio"/> No If so, to what:	
Immunization status: <input type="radio"/> Current <input type="radio"/> Delayed <input type="radio"/> None From whom was this information obtained?	
Does the child wear glasses? Does the child wear contacts?	
Birth History/Problems: <input type="radio"/> Yes <input type="radio"/> No Past Hospitalizations? <input type="radio"/> Yes <input type="radio"/> No If yes, when, where and why?	
Past surgeries? <input type="radio"/> Yes <input type="radio"/> No If yes, when, where and why?	
Major Illnesses: <input type="radio"/> Asthma/Wheezing/Chronic Cough <input type="radio"/> Diabetes <input type="radio"/> Seizures <input type="radio"/> Other (describe)	
Any major illnesses in the family: <input type="radio"/> Asthma/Wheezing/Chronic cough <input type="radio"/> Other	

This form was completed by:

Print your name: _____ Title: _____ Phone: _____

Signature: _____ Date: _____

Form Five: Medication

Child's Name: _____ Date: _____

Person Collecting Information: _____ Position/Agency: _____

Medication Name: _____

Physician's Name: _____

Dosage: _____

Pharmacy Name: _____

Pharmacy Phone #: _____

Prescription #: _____

Medication Name: _____

Physician's Name: _____

Dosage: _____

Pharmacy Name: _____

Pharmacy Phone #: _____

Prescription #: _____

Medication Name: _____

Physician's Name: _____

Dosage: _____

Pharmacy Name: _____

Pharmacy Phone #: _____

Prescription #: _____

Medication Name: _____

Physician's Name: _____

Dosage: _____

Pharmacy Name: _____

Pharmacy Phone #: _____

Prescription #: _____

Form Six: Medical Exam Information

The purpose of this form is to record basic medical information from the child's first thorough medical examination following removal from a methamphetamine lab. Attach additional pages as necessary. The form should be filled out by the attending physician or other hospital staff.

Treating physician: _____
Exam date: _____
Child's name: _____
Child's age: _____

Physical abuse

1. Describe any history of abuse provided by the child:

2. Describe signs of physical abuse observed on the child's body.

General condition

1. Height: _____

2. Weight: _____

3. Temperature: _____

☐ Otic ☐ Ax ☐ Oral ☐ Rectal

4. Pulse: _____

5. Respiratory rate: _____

6. Blood pressure: _____

7. O2 Saturation: _____

Studies and labs

1. Was a urine toxicology screen ordered?

☐ Yes

☐ No

2. Check the following lab tests that were ordered.

☐ CBC

☐ Renal Profile

☐ Electrolytes

☐ LFT's

3. Was a chest x-ray ordered?

Abnormal medical findings

1. Neurological abnormalities (pupils, eye movements, agitation, reflexes, tone, strength, sweating, seizures).

2. Describe any other abnormal findings.

Name of person who filled out this form:

Appendix Eight:

Full Text of Selected Statutes

Note: The following statutes are organized in the same manner as the statutory summaries are set out in Chapter One.

Crimes

Sexual Penetration, Sexual Contact, and Exposure Offenses

§ 16-3-651. Criminal sexual conduct: definitions.

For the purposes of §§ 16-3-651 to 16-3-659.1:

- (a) “Actor” means a person accused of criminal sexual conduct.
- (b) “Aggravated coercion” means that the actor threatens to use force or violence of a high and aggravated nature to overcome the victim or another person, if the victim reasonably believes that the actor has the present ability to carry out the threat, or threatens to retaliate in the future by the infliction of physical harm, kidnapping or extortion, under circumstances of aggravation, against the victim or any other person.
- (c) “Aggravated force” means that the actor uses physical force or physical violence of a high and aggravated nature to overcome the victim or includes the threat of the use of a deadly weapon.
- (d) “Intimate parts” includes the primary genital area, anus, groin, inner thighs, or buttocks of a male or female human being and the breasts of a female human being.
- (e) “Mentally defective” means that a person suffers from a mental disease or defect which renders the person temporarily or permanently incapable of appraising the nature of his or her conduct.
- (f) “Mentally incapacitated” means that a person is rendered temporarily incapable of appraising or controlling his or her conduct whether this condition is produced by illness, defect, the influence of a substance or from some other cause.
- (g) “Physically helpless” means that a person is unconscious, asleep, or for any other reason physically unable to communicate unwillingness to an act.
- (h) “Sexual battery” means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes.
- (i) “Victim” means the person alleging to have been subjected to criminal sexual conduct.

§ 16-3-652. Criminal sexual conduct in the first degree.

- (1) A person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery with the victim and if any one or more of the following circumstances are proven:
 - (a) The actor uses aggravated force to accomplish sexual battery.
 - (b) The victim submits to sexual battery by the actor under circumstances where the victim is also the victim of forcible confinement, kidnapping, trafficking in persons, robbery, extortion, burglary, housebreaking, or any other similar offense or act.
 - (c) The actor causes the victim, without the victim's consent, to become mentally incapacitated or physically helpless by administering, distributing, dispensing, delivering, or causing to be administered, distributed, dispensed, or delivered a controlled substance, a controlled substance analogue, or any intoxicating substance.
- (2) Criminal sexual conduct in the first degree is a felony punishable by imprisonment for not more than thirty years, according to the discretion of the court.

§ 16-3-653. Criminal sexual conduct in the second degree.

- (1) A person is guilty of criminal sexual conduct in the second degree if the actor uses aggravated coercion to accomplish sexual battery.
- (2) Criminal sexual conduct in the second degree is a felony punishable by imprisonment for not more than twenty years according to the discretion of the court.

§ 16-3-654. Criminal sexual conduct in the third degree.

- (1) A person is guilty of criminal sexual conduct in the third degree if the actor engages in sexual battery with the victim and if any one or more of the following circumstances are proven:
 - (a) The actor uses force or coercion to accomplish the sexual battery in the absence of aggravating circumstances.
 - (b) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless and aggravated force or aggravated coercion was not used to accomplish sexual battery.
- (2) Criminal sexual conduct in the third degree is a felony punishable by imprisonment for not more than ten years, according to the discretion of the court.

§ 16-3-655. Criminal sexual conduct with a minor; aggravating and mitigating circumstances; penalties; repeat offenders.

(A) A person is guilty of criminal sexual conduct with a minor in the first degree if:

- (1) the actor engages in sexual battery with a victim who is less than eleven years of age; or
- (2) the actor engages in sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for an offense listed in Section 23-3-430(C) or has been ordered to be included in the sex offender registry pursuant to Section 23-3-430(D).

(B) A person is guilty of criminal sexual conduct with a minor in the second degree if:

- (1) the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age; or
- (2) the actor engages in sexual battery with a victim who is at least fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim. However, a person may not be convicted of a violation of the provisions of this item if he is eighteen years of age or less when he engages in consensual sexual conduct with another person who is at least fourteen years of age.

(C)(1) A person convicted of a violation of subsection (A)(1) is guilty of a felony and, upon conviction, must be imprisoned for a mandatory minimum of twenty-five years, no part of which may be suspended or probation granted, or must be imprisoned for life. In the case of a person pleading guilty or nolo contendere to a violation of subsection (A)(1), the judge must make a specific finding on the record regarding whether the type of conduct that constituted the sexual battery involved sexual or anal intercourse by a person or intrusion by an object. In the case of a person convicted at trial for a violation of subsection (A)(1), the judge or jury, whichever is applicable, must designate as part of the verdict whether the conduct that constituted the sexual battery involved sexual or anal intercourse by a person or intrusion by an object. If the person has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for first degree criminal sexual conduct with a minor who is less than eleven years of age or a federal or out-of-state offense that would constitute first degree criminal sexual conduct with a minor who is less than eleven years of age, he must be punished by death or by imprisonment for life, as provided by this section. For the purpose of determining a prior conviction under this subsection, the person must have been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent on a separate occasion, prior to the instant adjudication, for first degree criminal sexual conduct with a minor who is less than eleven years of age or a federal or out-of-state offense that would constitute first degree criminal sexual conduct with a minor who is less than eleven years of age. In order to be eligible for the death penalty pursuant to this

section, the sexual battery constituting the current offense and any prior offense must have involved sexual or anal intercourse by a person or intrusion by an object. If any prior offense that would make a person eligible for the death penalty pursuant to this section occurred prior to the effective date of this act and no specific finding was made regarding the nature of the conduct or is an out-of-state or federal conviction, the determination of whether the sexual battery constituting the prior offense involved sexual or anal intercourse by a person or intrusion by an object must be made in the separate sentencing proceeding provided by this section and proven beyond a reasonable doubt and designated in writing by the judge or jury, whichever is applicable. If the judge or jury, whichever is applicable, does not find that the prior offense involved sexual or anal intercourse by a person or intrusion by an object, then the person must be sentenced to imprisonment for life. For purposes of this subsection, imprisonment for life means imprisonment until death.

(2) A person convicted of a violation of subsection (A)(2) is guilty of a felony and, upon conviction, must be imprisoned for not less than ten years nor more than thirty years, no part of which may be suspended or probation granted.

(3) A person convicted of a violation of subsection (B) is guilty of a felony and, upon conviction, must be imprisoned for not more than twenty years according to the discretion of the court.

[remainder of statute omitted]

§ 16-3-656. CSC: assaults with intent to commit.

Assault with intent to commit criminal sexual conduct described in the above sections shall be punishable as if the criminal sexual conduct was committed.

§ 16-3-658. CSC: where victim is spouse.

A person cannot be guilty of criminal sexual conduct under Sections 16-3-651 through 16-3-659.1 if the victim is the legal spouse unless the couple is living apart and the offending spouse's conduct constitutes criminal sexual conduct in the first degree or second degree as defined by Sections 16-3-652 and 16-3-653.

The offending spouse's conduct must be reported to appropriate law enforcement authorities within thirty days in order for a person to be prosecuted for these offenses.

This section is not applicable to a purported marriage entered into by a male under the age of sixteen or a female under the age of fourteen.

§ 16-3-659. Presumption abolished.

The common law rule that a boy under fourteen years is conclusively presumed to be incapable of committing the crime of rape shall not be enforced in this State. Provided, that any person under the age of 14 shall be tried as a juvenile for any violations of §§ 16-3-651 to 16-3-659.1.

§ 16-3-755. Sexual battery: persons affiliated with schools and students.

(A) For purposes of this section:

(1) ‘Aggravated coercion’ means that the person affiliated with a public or private secondary school in an official capacity threatens to use force or violence of a high and aggravated nature to overcome the student, if the student reasonably believes that the person has the present ability to carry out the threat, or threatens to retaliate in the future by the infliction of physical harm, kidnapping, or extortion, under circumstances of aggravation, against the student.

(2) ‘Aggravated force’ means that the person affiliated with a public or private secondary school in an official capacity uses physical force or physical violence of a high and aggravated nature to overcome the student or includes the threat of the use of a deadly weapon.

(3) ‘Person affiliated with a public or private secondary school in an official capacity’ means an administrator, teacher, substitute teacher, teacher’s assistant, student teacher, law enforcement officer, school bus driver, guidance counselor, or coach who is affiliated with a public or private secondary school but is not a student enrolled in the school.

(4) ‘Secondary school’ means either a junior high school or a high school.

(5) ‘Sexual battery’ means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes.

(6) ‘Student’ means a person who is enrolled in a school.

(B) If a person affiliated with a public or private secondary school in an official capacity engages in sexual battery with a student enrolled in the school who is sixteen or seventeen years of age, and aggravated coercion or aggravated force is not used to accomplish the sexual battery, the person affiliated with the public or private secondary school in an official capacity is guilty of a felony and, upon conviction, must be imprisoned for not more than five years.

(C) If a person affiliated with a public or private secondary school in an official capacity engages in sexual battery with a student enrolled in the school who is eighteen years of age or older, and aggravated coercion or aggravated force is not used to accomplish the sexual battery,

the person affiliated with the public or private secondary school in an official capacity is guilty of a misdemeanor and, upon conviction, must be fined not more than five hundred dollars or imprisoned for thirty days, or both.

(D) If a person affiliated with a public or private secondary school in an official capacity has direct supervisory authority over a student enrolled in the school who is eighteen years of age or older, and the person affiliated with the public or private secondary school in an official capacity engages in sexual battery with the student, and aggravated coercion or aggravated force is not used to accomplish the sexual battery, the person affiliated with the public or private secondary school in an official capacity is guilty of a felony and, upon conviction, must be imprisoned for not more than five years.

(E) This section does not apply if the person affiliated with a public or private secondary school in an official capacity is lawfully married to the student at the time of the act.”

§ 16-15-20. Incest.

Any persons who shall have carnal intercourse with each other within the following degrees of relationship, to wit: (1) A man with his mother, grandmother, daughter, granddaughter, stepmother, sister, grandfather’s wife, son’s wife, grandson’s wife, wife’s mother, wife’s grandmother, wife’s daughter, wife’s granddaughter, brother’s daughter, sister’s daughter, father’s sister or mother’s sister; or (2) A woman with her father, grandfather, son, grandson, stepfather, brother, grandmother’s husband, daughter’s husband, granddaughter’s husband, husband’s father, husband’s grandfather, husband’s son, husband’s grandson, brother’s son, sister’s son, father’s brother or mother’s brother;

Shall be guilty of incest and shall be punished by a fine of not less than five hundred dollars or imprisonment not less than one year in the Penitentiary, or both such fine and imprisonment.

§ 16-15-50. Seduction under promise of marriage.

A male over the age of sixteen years who by means of deception and promise of marriage seduces an unmarried woman in this State is guilty of a misdemeanor and, upon conviction, must be fined at the discretion of the court or imprisoned not more than one year. There must not be a conviction under this section on the uncorroborated testimony of the woman upon whom the seduction is charged, and no conviction if at trial it is proved that the woman was at the time of the alleged offense lewd and unchaste. If the defendant in any action brought under this section contracts marriage with the woman, either before or after the conviction, further proceedings of this section are stayed.

§ 16-15-120. Buggery.

Whoever shall commit the abominable crime of buggery, whether with mankind or with beast, shall, on conviction, be guilty of felony and shall be imprisoned in the Penitentiary for five years or shall pay a fine of not less than five hundred dollars, or both, at the discretion of the court.

§ 16-15-130. Indecent exposure.

(A)(1) It is unlawful for a person to willfully, maliciously, and indecently expose his person in a public place, on property of others, or to the view of any person on a street or highway.

(2) This subsection does not apply to a woman who breastfeeds her own child in a public place, on property of others, to the view of any person on a street or highway, or any other place where a woman and her child are authorized to be.

(B) A person who violates the provisions of subsection (A)(1) is guilty of a misdemeanor and, upon conviction, must be fined in the discretion of the court or imprisoned not more than three years, or both.

§ 16-15-140. Lewd acts upon a child under sixteen.

It is unlawful for a person over the age of fourteen years to willfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child. A person violating the provisions of this section is guilty of a felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than fifteen years, or both.

§ 16-17-490. Contributing to delinquency of a minor.

It shall be unlawful for any person over eighteen years of age to knowingly and willfully encourage, aid or cause or to do any act which shall cause or influence a minor:

- (1) To violate any law or any municipal ordinance;
- (2) To become and be incorrigible or ungovernable or habitually disobedient and beyond the control of his or her parent, guardian, custodian or other lawful authority;
- (3) To become and be habitually truant;

- (4) To without just cause and without the consent of his or her parent, guardian or other custodian, repeatedly desert his or her home or place of abode;
- (5) To engage in any occupation which is in violation of law;
- (6) To associate with immoral or vicious persons;
- (7) To frequent any place the existence of which is in violation of law;
- (8) To habitually use obscene or profane language;
- (9) To beg or solicit alms in any public places under any pretense;
- (10) To so deport himself or herself as to willfully injure or endanger his or her morals or health or the morals or health of others.

Any person violating the provisions of this section shall upon conviction be fined not more than three thousand dollars or imprisoned for not more than three years, or both, in the discretion of the court.

This section is intended to be cumulative and shall not be construed so as to defeat prosecutions under any other law which is applicable to unlawful acts embraced herein.

The provisions of this section shall not apply to any school board of trustees promulgating rules and regulations as authorized by § 59-19-90(3) which prescribe standards of conduct and behavior in the public schools of the district. Provided, however, that any such rule or regulation which contravenes any portion of the provisions of this section shall first require the consent of the parent or legal guardian of the minor or minors concerned.

§ 44-29-60. Exposing others to STDs.

Sexually transmitted diseases which are included in the annual Department of Health and Environmental Control List of Reportable Diseases are declared to be contagious, infectious, communicable, and dangerous to the public health. Sexually transmitted diseases include all venereal diseases. It is unlawful for anyone infected with these diseases to knowingly expose another to infection.

§ 44-29-145. Exposing others to HIV.

It is unlawful for a person who knows that he is infected with Human Immunodeficiency Virus (HIV) to:

- (1) knowingly engage in sexual intercourse, vaginal, anal, or oral, with another person without first informing that person of his HIV infection;
- (2) knowingly commit an act of prostitution with another person;
- (3) knowingly sell or donate blood, blood products, semen, tissue, organs, or other body fluids;
- (4) forcibly engage in sexual intercourse, vaginal, anal, or oral, without the consent of the other person, including one's legal spouse; or
- (5) knowingly share with another person a hypodermic needle, syringe, or both, for the introduction of drugs or any other substance into, or for the withdrawal of blood or body fluids from the other person's body without first informing that person that the needle, syringe, or both, has been used by someone infected with HIV.

A person who violates this section is guilty of a felony and, upon conviction, must be fined not more than five thousand dollars or imprisoned for not more than ten years.

§ 44-53-370(f). Administering, distributing, dispensing, or delivering controlled substance or gamma hydroxy butyrate with intent to commit crime.

(f) It shall be unlawful for a person to administer, distribute, dispense, deliver, or aid, abet, attempt, or conspire to administer, distribute, dispense, or deliver a controlled substance or gamma hydroxy butyrate to an individual with the intent to commit one of the following crimes against that individual:

- (1) kidnapping, Section 16-3-910;
- (2) trafficking in persons, Section 16-3-930;
- (3) criminal sexual conduct in the first, second, or third degree, Sections 16-3-652, 16-3-653, and 16-3-654;
- (4) criminal sexual conduct with a minor in the first or second degree, Section 16-3-655;
- (5) criminal sexual conduct where victim is legal spouse (separated), Section 16-3-658;
- (6) spousal sexual battery, Section 16-3-615;
- (7) engaging a child for a sexual performance, Section 16-3-810;
- (8) committing lewd act upon child under sixteen, Section 16-15-140;
- (9) petit larceny, Section 16-13-30 (A); or

(10) grand larceny, Section 16-13-30 (B).

§ 44-53-378. Exposing child to methamphetamine.

(A) It is unlawful for a person who is eighteen years of age or older to:

(1) either directly or by extraction from natural substances, or independently by means of chemical processes, or both, unlawfully manufacture amphetamine, its salts, isomers, or salts of isomers, or methamphetamine, its salts, isomers, or salts of its isomers in the presence of a minor child; or

(2) knowingly permit a child to be in an environment where a person is selling, offering for sale, or having in such person's possession with intent to sell, deliver, distribute, prescribe, administer, dispense, manufacture, or attempt to manufacture amphetamine or methamphetamine; or

(3) knowingly permit a child to be in an environment where drug paraphernalia or volatile, toxic, or flammable chemicals are stored for the purpose of manufacturing or attempting to manufacture amphetamine or methamphetamine.

(B) A person who violates subsection (A)(1), (2), or (3), upon conviction, for a first offense must be imprisoned not more than five years or fined not more than five thousand dollars, or both.

Upon conviction for a second or subsequent offense, the person must be imprisoned not more than ten years or fined not more than ten thousand dollars, or both.

Child Sexual Exploitation and Obscenity Offenses

§ 16-3-810. Engaging child for sexual performance.

(a) It is unlawful for any person to employ, authorize, or induce a child younger than eighteen years of age to engage in a sexual performance. It is unlawful for a parent or legal guardian or custodian of a child younger than eighteen years of age to consent to the participation by the child in a sexual performance.

(b) Any person violating the provisions of subsection (a) of this section is guilty of criminal sexual conduct of the second degree and upon conviction shall be punished as provided in § 16-3-653.

§ 16-3-820. Sexual performance by a child.

(a) It is unlawful for any person to produce, direct, or promote a performance that includes sexual conduct by a child younger than eighteen years of age.

- (b) Any person violating the provisions of subsection (a) of this section is guilty of criminal sexual conduct of the third degree and upon conviction shall be punished as provided in § 16-3-654.

§ 16-15-305. Disseminating obscenity; definitions.

- (A) It is unlawful for any person knowingly to disseminate obscenity. A person disseminates obscenity within the meaning of this article if he: (1) sells, delivers, or provides or offers or agrees to sell, deliver, or provide any obscene writing, picture, record, digital electronic file, or other representation or description of the obscene; (2) presents or directs an obscene play, dance, or other performance, or participates directly in that portion thereof which makes it obscene; (3) publishes, exhibits, or otherwise makes available anything obscene to any group or individual; or (4) exhibits, presents, rents, sells, delivers, or provides; or offers or agrees to exhibit, present, rent, or to provide: any motion picture, film, filmstrip, or projection slide, or sound recording, sound tape, or sound track, video tapes and recordings, or any matter or material of whatever form which is a representation, description, performance, or publication of the obscene.
- (B) For purposes of this article any material is obscene if: (1) to the average person applying contemporary community standards, the material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (C) of this section; (2) the average person applying contemporary community standards relating to the depiction or description of sexual conduct would find that the material taken as a whole appeals to the prurient interest in sex; (3) to a reasonable person, the material taken as a whole lacks serious literary, artistic, political, or scientific value; and (4) the material as used is not otherwise protected or privileged under the Constitutions of the United States or of this State.
- (C) As used in this article:
- (1) “sexual conduct” means: (a) vaginal, anal, or oral intercourse, whether actual or simulated, normal or perverted, whether between human beings, animals, or a combination thereof; (b) masturbation, excretory functions, or lewd exhibition, actual or simulated, of the genitals, pubic hair, anus, vulva, or female breast nipples including male or female genitals in a state of sexual stimulation or arousal or covered male genitals in a discernibly turgid state; (c) an act or condition that depicts actual or simulated bestiality, sado- masochistic abuse, meaning flagellation or torture by or upon a person who is nude or clad in undergarments or in a costume which reveals the pubic hair, anus, vulva, genitals, or female breast nipples, or the condition of being

- fettered, bound, or otherwise physically restrained on the part of the one so clothed; (d) an act or condition that depicts actual or simulated touching, caressing, or fondling of, or other similar physical contact with, the covered or exposed genitals, pubic or anal regions, or female breast nipple, whether alone or between humans, animals, or a human and an animal, of the same or opposite sex, in an act of actual or apparent sexual stimulation or gratification; or (e) an act or condition that depicts the insertion of any part of a person's body, other than the male sexual organ, or of any object into another person's anus or vagina, except when done as part of a recognized medical procedure.
- (2) "patently offensive" means obviously and clearly disagreeable, objectionable, repugnant, displeasing, distasteful, or obnoxious to contemporary standards of decency and propriety within the community.
 - (3) "prurient interest" means a shameful or morbid interest in nudity, sex, or excretion and is reflective of an arousal of lewd and lascivious desires and thoughts.
 - (4) "person" means any individual, corporation, partnership, association, firm, club, or other legal or commercial entity.
 - (5) "knowingly" means having general knowledge of the content of the subject material or performance, or failing after reasonable opportunity to exercise reasonable inspection which would have disclosed the character of the material or performance.
- (D) Obscenity must be judged with reference to ordinary adults except that it must be judged with reference to children or other especially susceptible audiences or clearly defined deviant sexual groups if it appears from the character of the material or the circumstances of its dissemination to be especially for or directed to children or such audiences or groups.
- (E) As used in this article, "community standards" used in determining prurient appeal and patent offensiveness are the standards of the area from which the jury is drawn.
- (F) It is unlawful for any person knowingly to create, buy, procure, or process obscene material with the purpose and intent of disseminating it.
- (G) It is unlawful for a person to advertise or otherwise promote the sale of material represented or held out by them as obscene.
- (H) A person who violates this section is guilty of a felony and, upon conviction, must be imprisoned not more than five years or fined not more than ten thousand dollars, or both.

- (I) Obscene material disseminated, procured, or promoted in violation of this section is contraband and may be seized by appropriate law enforcement authorities.

§ 16-15-335. Using minor to violate obscenity statutes.

An individual eighteen years of age or older who, in any manner, knowingly hires, employs, uses, or permits a person under the age of eighteen years to do or assist in doing an act or thing constituting an offense under this article and involving any material, act, or thing he knows or reasonably should know to be obscene within the meaning of § 16-15-305 is guilty of a felony and, upon conviction, must be imprisoned for not more than ten years.

§ 16-15-342. Criminal solicitation of a minor.

- (A) A person eighteen years of age or older commits the offense of criminal solicitation of a minor if he knowingly contacts or communicates with, or attempts to contact or communicate with, a person who is under the age of eighteen, or a person reasonably believed to be under the age of eighteen, for the purpose of or with the intent of persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity as defined in Section 1615375(5) or a violent crime as defined in Section 16160, or with the intent to perform a sexual activity in the presence of the person under the age of eighteen, or person reasonably believed to be under the age of eighteen.
- (B) Consent is a defense to a prosecution pursuant to this section if the person under the age of eighteen, or the person reasonably believed to be under the age of eighteen, is at least sixteen years old.
- (C) Consent is not a defense to a prosecution pursuant to this section if the person under the age of eighteen, or the person reasonably believed to be under the age of eighteen, is under the age of sixteen.
- (D) It is not a defense to a prosecution pursuant to this section, on the basis of consent or otherwise, that the person reasonably believed to be under the age of eighteen is a law enforcement agent or officer acting in an official capacity.
- (E) A person who violates the provisions of this section is guilty of a felony and, upon conviction, must be fined not more than five thousand dollars or imprisoned for not more than ten years, or both.

16-15-345. Disseminating obscenity to a person under 18.

An individual eighteen years of age or older who knowingly disseminates to a person under the age of eighteen years material which he knows or reasonably should know to be obscene within the meaning of § 16-15-305 is guilty of a felony and, upon conviction, must be imprisoned for not more than ten years.

§ 16-15-355. Disseminating obscenity to a person under 12.

An individual eighteen years of age or older who knowingly disseminates to a minor twelve years of age or younger material which he knows or reasonably should know to be obscene within the meaning of § 16-15-305 is guilty of a felony and, upon conviction, must be imprisoned for not more than fifteen years.

§ 16-15-375. Definitions applicable to §§ 16-15-385 through 16-15-425.

The following definitions apply to Section 16-15-385, disseminating or exhibiting to minors harmful material or performances; Section 16-15-387, employing a person under the age of eighteen years to appear in a state of sexually explicit nudity in a public place; Section 16-15-395, first degree sexual exploitation of a minor; Section 16-15-405, second degree sexual exploitation of a minor; Section 16-15-410, third degree sexual exploitation of a minor; Section 16-15-415, promoting prostitution of a minor; and Section 16-15-425, participating in prostitution of a minor.

- (1) “Harmful to minors” means that quality of any material or performance that depicts sexually explicit nudity or sexual activity and that, taken as a whole, has the following characteristics: (a) the average adult person applying contemporary community standards would find that the material or performance has a predominant tendency to appeal to a prurient interest of minors in sex; and (b) the average adult person applying contemporary community standards would find that the depiction of sexually explicit nudity or sexual activity in the material or performance is patently offensive to prevailing standards in the adult community concerning what is suitable for minors; and (c) to a reasonable person, the material or performance taken as a whole lacks serious literary, artistic, political, or scientific value for minors.
- (2) “Material” means pictures, drawings, video recordings, films, digital electronic files, or other visual depictions or representations but not material consisting entirely of written words.

- (3) “Minor” means an individual who is less than eighteen years old.
- (4) “Prostitution” means engaging or offering to engage in sexual activity with or for another in exchange for anything of value.
- (5) “Sexual activity” includes any of the following acts or simulations thereof: (a) masturbation, whether done alone or with another human or animal; (b) vaginal, anal, or oral intercourse, whether done with another human or an animal; (c) touching, in an act of apparent sexual stimulation or sexual abuse, of the clothed or unclothed genitals, pubic area, or buttocks of another person or the clothed or unclothed breasts of a human female; (d) an act or condition that depicts bestiality, sado-masochistic abuse, meaning flagellation or torture by or upon a person who is nude or clad in undergarments or in a costume which reveals the pubic hair, anus, vulva, genitals, or female breast nipples, or the condition of being fettered, bound, or otherwise physically restrained on the part of the one so clothed; (e) excretory functions; (f) the insertion of any part of a person’s body, other than the male sexual organ, or of any object into another person’s anus or vagina, except when done as part of a recognized medical procedure.
- (6) “Sexually explicit nudity” means the showing of: (a) uncovered, or less than opaquely covered human genitals, pubic area, or buttocks, or the nipple or any portion of the areola of the human female breast; or (b) covered human male genitals in a discernibly turgid state.

§ 16-15-385. Disseminating harmful material to minors.

- (A) A person commits the offense of disseminating harmful material to minors if, knowing the character or content of the material, he: (1) sells, furnishes, presents, or distributes to a minor material that is harmful to minors; or (2) allows a minor to review or peruse material that is harmful to minors.

A person does not commit an offense under this subsection when he employs a minor to work in a theater if the minor’s parent or guardian consents to the employment and if the minor is not allowed in the viewing area when material harmful to minors is shown.

- (B) A person commits the offense of exhibiting a harmful performance to a minor if, with or without consideration and knowing the character or content of the performance, he allows a minor to view a live performance which is harmful to minors.
- (C) Except as provided in item (3) of this subsection, mistake of age is not a defense to a prosecution under this section. It is an affirmative defense under this section that: (1) the defendant was a parent or legal guardian of a minor, but this item does not apply when the

parent or legal guardian exhibits or disseminates the harmful material for the sexual gratification of the parent, guardian, or minor. (2) the defendant was a school, church, museum, public, school, college, or university library, government agency, medical clinic, or hospital carrying out its legitimate function, or an employee or agent of such an organization acting in that capacity and carrying out a legitimate duty of his employment. (3) before disseminating or exhibiting the harmful material or performance, the defendant requested and received a driver's license, student identification card, or other official governmental or educational identification card or paper indicating that the minor to whom the material or performance was disseminated or exhibited was at least eighteen years old, and the defendant reasonably believed the minor was at least eighteen years old.

- (D) A person who violates the provisions of this section is guilty of a felony and, upon conviction, must be imprisoned not more than ten years or fined not more than five thousand dollars, or both.

§ 16-15-387. Public nudity.

- (A) It is unlawful for a person to employ a person under the age of eighteen years to appear in a state of sexually explicit nudity, as defined in Section 16-15-375(6), in a public place.
- (B) Mistake of age is not a defense to a prosecution pursuant to this section. A person who violates the provisions of this section is guilty of a felony and, upon conviction, must be imprisoned not more than ten years or fined not more than five thousand dollars, or both.

§ 16-15-395. First degree sexual exploitation of a minor.

- (A) An individual commits the offense of first degree sexual exploitation of a minor if, knowing the character or content of the material or performance, he:
- (1) uses, employs, induces, coerces, encourages, or facilitates a minor to engage in or assist others to engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity;
 - (2) permits a minor under his custody or control to engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity;
 - (3) transports or finances the transportation of a minor through or across this State with the intent that the minor engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity; or

- (4) records, photographs, films, develops, duplicates, produces, or creates a digital electronic file for sale or pecuniary gain material that contains a visual representation depicting a minor engaged in sexual activity.
- (B) In a prosecution under this section, the trier of fact may infer that a participant in a sexual activity depicted in material as a minor through its title, text, visual representations, or otherwise, is a minor.
- (C) Mistake of age is not a defense to a prosecution under this section.
- (D) A person who violates the provisions of this section is guilty of a felony and, upon conviction, must be imprisoned for not less than three years nor more than twenty years. No part of the minimum sentence of imprisonment may be suspended nor is the individual convicted eligible for parole until he has served the minimum term of imprisonment. Sentences imposed pursuant to this section must run consecutively with and commence at the expiration of another sentence being served by the person sentenced.

§ 16-15-405. Second degree sexual exploitation of a minor.

- (A) An individual commits the offense of second degree sexual exploitation of a minor if, knowing the character or content of the material, he:
 - (1) records, photographs, films, develops, duplicates, produces, or creates digital electronic file material that contains a visual representation of a minor engaged in sexual activity; or
 - (2) distributes, transports, exhibits, receives, sells, purchases, exchanges, or solicits material that contains a visual representation of a minor engaged in sexual activity.
- (B) In a prosecution under this section, the trier of fact may infer that a participant in sexual activity depicted in material as a minor through its title, text, visual representations, or otherwise, is a minor.
- (C) Mistake of age is not a defense to a prosecution under this section.
- (D) A person who violates the provisions of this section is guilty of a felony and, upon conviction, must be imprisoned not less than two years nor more than ten years. No part of the minimum sentence may be suspended nor is the individual convicted eligible for parole until he has served the minimum sentence.

§ 16-15-410. Third degree sexual exploitation of a minor.

- (A) An individual commits the offense of third degree sexual exploitation of a minor if, knowing the character or content of the material, he possesses material that contains a visual representation of a minor engaging in sexual activity.
- (B) In a prosecution under this section, the trier of fact may infer that a participant in sexual activity depicted as a minor through its title, text, visual representation, or otherwise is a minor.
- (C) A person who violates the provisions of this section is guilty of a felony and, upon conviction, must be imprisoned not more than ten years.
- (D) This section does not apply to an employee of a law enforcement agency, including the State Law Enforcement Division, a prosecuting agency, including the South Carolina Attorney General's Office, or the South Carolina Department of Corrections who, while acting within the employee's official capacity in the course of an investigation or criminal proceeding, is in possession of material that contains a visual representation of a minor engaging in sexual activity.

§ 16-15-415. Promoting prostitution of a minor.

- (A) An individual commits the offense of promoting prostitution of a minor if he knowingly: (1) entices, forces, encourages, or otherwise facilitates a minor to participate in prostitution; or (2) supervises, supports, advises, or promotes the prostitution of or by a minor.
- (B) Mistake of age is not a defense to a prosecution under this section.
- (C) An individual who violates the provisions of this section is guilty of a felony and, upon conviction, must be imprisoned for not less than three years nor more than twenty years. No part of the minimum sentence may be suspended nor is the individual convicted eligible for parole until he has served the minimum sentence. Sentences imposed pursuant to this section must run consecutively with and must commence at the expiration of another sentence being served by the individual sentenced.

§ 16-15-425. Participating in prostitution of a minor.

- (A) An individual commits the offense of participating in the prostitution of a minor if he is not a minor and he patronizes a minor prostitute. As used in this section, "patronizing a minor prostitute" means: (1) soliciting or requesting a minor to participate in prostitution; (2) paying or agreeing to pay a minor, either directly or through the minor's agent, to

participate in prostitution; or (3) paying a minor, or the minor's agent, for having participated in prostitution, pursuant to a prior agreement.

- (B) Mistake of age is not a defense to a prosecution under this section.
- (C) A person who violates the provisions of this section is guilty of a felony and, upon conviction, must be imprisoned not less than two years nor more than five years. No part of the minimum sentence may be suspended nor is the individual convicted eligible for parole until he has served the minimum term. Sentences imposed pursuant to this section shall run consecutively with and shall commence at the expiration of any other sentence being served by the individual sentenced.

Child Physical Abuse Offenses

§ 16-3-95. Great bodily injury upon a child.

- (A) It is unlawful to inflict great bodily injury upon a child. A person who violates this subsection is guilty of a felony and, upon conviction, must be imprisoned not more than twenty years.
- (B) It is unlawful for a child's parent or guardian, person with whom the child's parent or guardian is cohabitating, or any other person responsible for a child's welfare as defined in Section 63-7-20 knowingly to allow another person to inflict great bodily injury upon a child. A person who violates this subsection is guilty of a felony and, upon conviction, must be imprisoned not more than five years.
- (C) For purposes of this section, "great bodily injury" means bodily injury which creates a substantial risk of death or which causes serious or permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.
- (D) This section may not be construed to prohibit corporal punishment or physical discipline which is administered by a parent or person in loco parentis in a manner which does not cause great bodily injury upon a child.
- (E) This section does not apply to traffic accidents unless the accident was caused by the driver's reckless disregard for the safety of others.

§ 16-3-910. Kidnapping.

Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized or

taken by his parent, is guilty of a felony and, upon conviction, must be imprisoned for a period not to exceed thirty years unless sentenced for murder as provided in Section 16-3-20.

§ 16-3-920. Conspiracy to kidnap.

If two or more persons enter into an agreement, confederation, or conspiracy to violate the provisions of Section 16-3-910 and any of such persons do any overt act towards carrying out such unlawful agreement, confederation, or conspiracy, each such person shall be guilty of a felony and, upon conviction, shall be punished in like manner as provided for the violation of Section 16-3-910.

§ 16-17-495. Custodial interference.

- (A)(1) When a court of competent jurisdiction in this State or another state has awarded custody of a child under the age of sixteen years or when custody of a child under the age of sixteen years is established pursuant to Section 63-17-20(B), it is unlawful for a person with the intent to violate the court order or Section 63-17-20(B) to take or transport, or cause to be taken or transported, the child from the legal custodian for the purpose of concealing the child, or circumventing or avoiding the custody order or statute.
- (2) When a pleading has been filed and served seeking a determination of custody of a child under the age of sixteen, it is unlawful for a person with the intent to circumvent or avoid the custody proceeding to take or transport, or cause to be taken or transported, the child for the purpose of concealing the child, or circumventing or avoiding the custody proceeding. It is permissible to infer that a person keeping a child outside the limits of this State for more than seventy-two hours without notice to a legal custodian intended to violate this subsection.
- (B) A person who violates subsection (A)(1) or (2) is guilty of a felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than five years, or both.
- (C) If a person who violates subsection (A)(1) or (2) returns the child to the legal custodian or to the jurisdiction of the court in which the custody petition was filed within three days of the violation, the person is guilty of a misdemeanor and, upon conviction, must be fined in the discretion of the court or imprisoned not more than three years, or both.
- (D) Notwithstanding the provisions of this section, if the taking or transporting of a child in violation of subsections (A)(1) or (2), is by physical force or the threat of physical force, the

person is guilty of a felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than ten years, or both.

- (E) A person who violates the provisions of this section may be required by the court to pay necessary travel and other reasonable expenses including, but not limited to, attorney's fees incurred by the party entitled to the custody or by a witness or law enforcement.

§ 16-17-510. Enticing enrolled child from attendance in school.

It is unlawful for a person to encourage, entice, or conspire to encourage or entice a child enrolled in any public or private elementary or secondary school of this State from attendance in the school or school program or transport or provide transportation in aid to encourage or entice a child from attendance in any public or private elementary or secondary school or school program.

A person who violates the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than two years, or both. Notwithstanding the provisions of Sections 22-3-540, 22-3-545, and 22-3-550, a first or second offense must be tried exclusively in magistrate's court. Third and subsequent offenses must be tried in the court of general sessions.

§ 63-5-70. Unlawful conduct towards child.

- (A) It is unlawful for a person who has charge or custody of a child, or who is the parent or guardian of a child, or who is responsible for the welfare of a child as defined in Section 63-7-20(3) to: (1) place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety; (2) do or cause to be done unlawfully or maliciously any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered; or (3) willfully abandon the child.
- (B) A person who violates subsection (A) is guilty of a felony and for each offense, upon conviction, must be fined in the discretion of the court or imprisoned not more than ten years, or both.

§ 63-5-80. Cruelty to children.

Whoever cruelly ill-treats, deprives of necessary sustenance or shelter, or inflicts unnecessary pain or suffering upon a child or causes the same to be done, whether the person is the parent or guardian or has charge or custody of the child, for every offense, is guilty of a misdemeanor and,

upon conviction, must be imprisoned not more than thirty days or fined not more than two hundred dollars, at the discretion of the magistrate.

Homicide Offenses

§ 16-3-10. “Murder” defined.

“Murder” is the killing of any person with malice aforethought, either express or implied.

§16-3-29. Attempted murder

A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder. A person who violates this section is guilty of a felony, and, upon conviction, must be imprisoned for not more than thirty years. A sentence imposed pursuant to this section may not be suspended nor may probation be granted.

§ 16-3-50. Manslaughter.

A person convicted of manslaughter, or the unlawful killing of another without malice, express or implied, must be imprisoned not more than thirty years or less than two years.

§ 16-3-60. Involuntary manslaughter.

With regard to the crime of involuntary manslaughter, criminal negligence is defined as the reckless disregard of the safety of others. A person charged with the crime of involuntary manslaughter may be convicted only upon a showing of criminal negligence as defined in this section. A person convicted of involuntary manslaughter must be imprisoned not more than five years.

§ 16-3-85. Homicide by child abuse.

(A) A person is guilty of homicide by child abuse if the person: (1) causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life; or (2) knowingly aids and

abets another person to commit child abuse or neglect, and the child abuse or neglect results in the death of a child under the age of eleven.

- (B) For purposes of this section, the following definitions apply: (1) “child abuse or neglect” means an act or omission by any person which causes harm to the child’s physical health or welfare; (2) “harm” to a child’s health or welfare occurs when a person: (a) inflicts or allows to be inflicted upon the child physical injury, including injuries sustained as a result of excessive corporal punishment; (b) fails to supply the child with adequate food, clothing, shelter, or health care, and the failure to do so causes a physical injury or condition resulting in death; or (c) abandons the child resulting in the child’s death.
- (C) Homicide by child abuse is a felony and a person who is convicted of or pleads guilty to homicide by child abuse: (1) under subsection (A)(1) may be imprisoned for life but not less than a term of twenty years; or (2) under subsection (A)(2) must be imprisoned for a term not exceeding twenty years nor less than ten years.
- (D) In sentencing a person under this section, the judge must consider any aggravating circumstances including, but not limited to, a defendant’s past pattern of child abuse or neglect of a child under the age of eleven, and any mitigating circumstances; however, a child’s crying does not constitute provocation so as to be considered a mitigating circumstance.

Assault and Battery Offenses

§ 16-3-600. Assault and battery.

(A) For purposes of this section:

- (1) ‘Great bodily injury’ means bodily injury which causes a substantial risk of death or which causes a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ.
- (2) ‘Moderate bodily injury’ means physical injury requiring treatment to an organ system of the body other than the skin, muscles, and connective tissues of the body, except when there is penetration of the skin, muscles, and connective tissues that require surgical

repair of a complex nature or when treatment of the injuries requires the use of regional or general anesthesia.

- (3) 'Private parts' means the genital area or buttocks of a male or female or the breasts of a female.

(B)(1) A person commits the offense of assault and battery of a high and aggravated nature if the person unlawfully injures another person, and:

- (a) great bodily injury to another person results; or
- (b) the act is accomplished by means likely to produce death or great bodily injury.

(2) A person who violates this subsection is guilty of a felony, and, upon conviction, must be imprisoned for not more than twenty years.

(3) Assault and battery of a high and aggravated nature is a lesser-included offense of attempted murder, as defined in Section 16-3-29.

(C)(1) A person commits the offense of assault and battery in the first degree if the person unlawfully:

- (a) injures another person, and the act:
 - (i) involves nonconsensual touching of the private parts of a person, either under or above clothing, with lewd and lascivious intent; or
 - (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft; or
- (b) offers or attempts to injure another person with the present ability to do so, and the act:
 - (i) is accompanied by means likely to produce death or great bodily injury; or
 - (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft.

(2) A person who violates this subsection is guilty of a felony, and, upon conviction, must be imprisoned for not more than ten years

(3) Assault and battery in the first degree is a lesser-included offense of assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and attempted murder, as defined in Section 16-3-29.

(D)(1) A person commits the offense of assault and battery in the second degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so, and:

(a) moderate bodily injury to another person results or moderate bodily injury to another person could have resulted; or

(b) the act involves the nonconsensual touching of the private parts of a person, either under or above clothing.

(2) A person who violates this subsection is guilty of a misdemeanor, and, upon conviction, must be fined not more than two thousand five hundred dollars, or imprisoned for not more than three years, or both.

(3) Assault and battery in the second degree is a lesser-included offense of assault and battery in the first degree, as defined in subsection (C)(1), assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and attempted murder, as defined in Section 16-3-29.

(E)(1) A person commits the offense of assault and battery in the third degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so.

(2) A person who violates this subsection is guilty of a misdemeanor, and, upon conviction must be fined not more than five hundred dollars, or imprisoned for not more than thirty days, or both.

(3) Assault and battery in the third degree is a lesser-included offense of assault and battery in the second degree, as defined in subsection (D)(1), assault and battery in the first degree, as defined in subsection (C)(1), assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and attempted murder, as defined in Section 16-3-29.

Sentencing

Note: In most of the following statutory excerpts, only those offenses discussed in this manual are listed.

Felony and Misdemeanor Classifications. S.C. Code Ann. § 16-1-90.

§ 16-1-10. Categorization of felonies and misdemeanors; exemptions.

(A) Felonies are classified, for the purpose of sentencing, into the following six categories:

- (1) Class A felonies
- (2) Class B felonies
- (3) Class C felonies
- (4) Class D felonies
- (5) Class E felonies
- (6) Class F felonies

(B) Misdemeanors are classified, for the purpose of sentencing, into the following three categories:

- (1) Class A misdemeanors
- (2) Class B misdemeanors
- (3) Class C misdemeanors

(C) All offenses with a term of imprisonment of less than one year are misdemeanors and exempt from the classification system.

(D) The following offenses are classified as exempt under subsections (A) and (B):

§ 16-3-10 Murder

§ 16-3-85(C)(1) Causing the death of a child by abuse or neglect

§ 16-3-620 Assault with intent to kill (if sentenced for the common law offense of assault and battery of a high and aggravated nature)

§ 16-3-910 Kidnapping (if sentenced for murder)

§ 16-15-20 Incest

§ 16-1-20. Penalties for classes of felonies.

(A) A person convicted of classified offenses, must be imprisoned as follows:

- (1) for a Class A felony, not more than thirty years;
- (2) for a Class B felony, not more than twenty-five years;
- (3) for a Class C felony, not more than twenty years;
- (4) for a Class D felony, not more than fifteen years;
- (5) for a Class E felony, not more than ten years;
- (6) for a Class F felony, not more than five years;
- (7) for a Class A misdemeanor, not more than three years;
- (8) for a Class B misdemeanor, not more than two years;
- (9) for a Class C misdemeanor, not more than one year.

(B) For all offenders sentenced on or after July 1, 1993, the minimum term of imprisonment required by law does not apply to the offenses listed in Sections 16-1-90 and 16-1-100 unless the offense refers to a mandatory minimum sentence or the offense prohibits suspension of any part of the sentence. Offenses listed in Section 16-1-10(C) and (D) are exempt and minimum terms of imprisonment are applicable. No sentence of imprisonment precludes the timely execution of a death sentence.

(C) This chapter does not apply to the minimum sentences established for fines or community service.

§ 16-1-90. Crimes classified as felonies.

“(A) The following offenses are Class A felonies and the maximum terms established for a Class A felony, as set forth in Section 16-1-20(A), apply:

10-11-325(B)(2) Detonating an explosive or destructive device or igniting an incendiary device upon the capitol grounds or within the capitol building resulting in death to a person where there was not malice aforethought

16-3-50 Manslaughter--voluntary

16-3-652 Criminal sexual conduct 1st degree

16-3-655(C)(2) Criminal sexual conduct, 1st degree, with
minor less than 16, 2nd offense

16-3-656 Assault with intent to commit criminal sexual conduct 1st degree

16-3-658 Criminal sexual conduct where victim is legal spouse (separated) 1st degree

16-3-910 Kidnapping

16-3-920 Conspiracy to commit kidnapping

16-3-930 Trafficking in persons

16-3-1075(B)(2) Carjacking (great bodily injury)

16-11-110(A) Arson in the 1st degree

16-11-330(A) Robbery while armed with a deadly weapon

16-11-380(A) Entering bank with intent to steal money, securities for money, or property, by force, intimidation, or threats

16-11-390 Safecracking

16-11-532(D)(2) Injuring real property when illegally obtaining nonferrous metals and the act results in the death of a person

16-23-720(A)(2) Detonating a destructive device or causing an explosion, or intentionally aiding, counseling, or procuring an explosion by means of detonation of a destructive device which results in the death of a person where there was not malice aforethought

24-13-450 Taking of a hostage by an inmate

43-35-85(F), 16-3-1050(F) Abuse or neglect of a vulnerable adult resulting in death

44-53-370 Prohibited Acts A, penalties (b)(1) (narcotic drugs in Schedules I(b) and (c), LSD, and Schedule II) second, third, or subsequent offense

44-53-370(e)(2)(a)2 Prohibited Acts A, penalties (trafficking in cocaine, 10 grams or more but less than 28 grams) second offense

44-53-370(e)(2)(b)2 Prohibited Acts, penalties (trafficking in cocaine, 28 grams or more but less than 100 grams) second offense

44-53-370(e)(5)(a)2 Prohibited Acts, penalties (trafficking in LSD, 100 dosage units or more but less than 500 dosage units) second offense

44-53-370(e)(5)(b)2 Prohibited Acts, penalties (trafficking in LSD, 500 dosage units or more but less than 1,000 dosage units) second offense

44-53-370(e)(5)(a)3 Prohibited Acts, penalties (trafficking in LSD, 100 dosage units or more, but less than 500 dosage units) third or subsequent offense

44-53-370(e)(5)(b)3 Prohibited Acts, penalties (trafficking in LSD, 500 dosage units or more, but less than 1,000 dosage units) third or subsequent offense

- 44-53-370(e)(6)(d) Prohibited Acts, penalties (trafficking in flunitrazepam, 5 kilograms or more)
- 44-53-370(e)(8)(a)(ii) Trafficking in MDMA or ecstasy, 100 dosage units but less than 500--second offense
- 44-53-370(e)(8)(a)(iii) Trafficking in MDMA or ecstasy, 100 dosage units but less than 500--Third or subsequent offense
- 44-53-370(e)(8)(b)(ii) Trafficking in MDMA or ecstasy, 100 dosage units but less than 1000--third or subsequent offense
- 44-53-370(e)(8)(b)(iii) Trafficking in MDMA or ecstasy, 100 dosage units but less than 1000--third or subsequent offense
- 44-53-370(g)(1)(b) Prohibited Acts A, penalties (distribution of narcotic drugs in Schedules I(b) and (c), LSD, and Schedule II with intent to commit a crime) second offense
- 44-53-370(g)(1)(c) Prohibited Acts A, penalties (distribution of narcotic drugs in Schedules I(b) and (c), LSD, and Schedule II with intent to commit a crime) third or subsequent offense
- 44-53-375(B)(2) Manufacture, distribution of methamphetamine or cocaine base, second Offense
- 44-53-375(B)(3) Manufacture, distribution, etc., methamphetamine, or cocaine base third or subsequent offense
- 44-53-375(C)(1)(b) Trafficking in ice, crank, or crack cocaine (10 grams or more but less than 28 grams) second offense
- 44-53-375(C)(2)(b) Trafficking in ice, crank, or crack cocaine (28 grams or more but less than 100 grams) second offense
- 55-1-30(3) Unlawful removing or damaging of airport facility or equipment when death results
- 56-5-1030(B)(3) Interference with traffic-control devices or railroad signs or signals prohibited when death results from violation
- 58-17-4090 Penalty for obstruction of railroad”
- (B) The following offenses are Class B felonies and the maximum terms established for a Class B felony, as set forth in Section 16-1-20(A), apply:
- [Note: No child abuse related offenses are Class B felonies]
- (C) The following offenses are Class C felonies and the maximum terms established for a Class C felony, as set forth in Section 16-1-20(A), apply:
- § 16-3-85(C)(2) Aiding in the death of a child by abuse or neglect

§ 16-3-95(A) Inflicting great bodily injury upon a child

§ 16-3-620 Assault and battery with intent to kill

§ 16-3-653 Criminal sexual conduct — Second degree

§ 16-3-655(2) Criminal sexual conduct with minor--victim 14 years of age or less, but who is at least 11 years of age — Second degree

§ 16-3-655(3) Criminal sexual conduct with minor--victim less than 16 years of age, but who is at least 14 years of age — Second degree

§ 16-3-656 Assault with intent to commit criminal sexual conduct — Second degree

§ 16-3-810 Engaging child under 18 for sexual performance

(D) The following offenses are Class D felonies and the maximum terms established for a Class D felony, as set forth in Section 16-1-20(A), apply:

10-11-325(A) Possessing, having readily accessible, or transporting onto the capitol grounds or within the capitol building an explosive, destructive, or incendiary device

16-1-55 Accessory after the fact of a Class A, B, or C felony

16-3-1090(B) Assist another person in committing suicide

16-3-1730(C) Stalking within ten years of a conviction of harassment or stalking

16-11-312 Burglary--second degree

16-11-325 Common law robbery

16-11-525(D)(1) Injuring real property when illegally obtaining nonferrous metals and the act results in great bodily injury to person

16-15-140 Committing or attempting lewd act upon child under 16

16-15-355 Disseminating obscene material to a minor 12 years or younger

16-23-720(C) Possessing, manufacturing, transporting, distributing, possessing with the intent to distribute any explosive device, substance, or material configured to damage, injure, or kill a person, or possessing materials which when assembled constitute a destructive device

16-23-720(D) Threaten by means of a destructive weapon

16-23-720(E) Harboring one known to have violated provisions relating to bombs, weapons of mass destruction, and destructive devices

16-23-730 Communicating or transmitting to a person that a hoax device or replica is a destructive device or detonator with intent to intimidate or threaten injury, obtain property, or interfere with the ability of a person or government to conduct its affairs

16-23-750 Communicating or aiding and abetting the communication of a threat or conveying

false information concerning an attempt to kill, injure, or intimidate a person or damage property or destroy by means of an explosive, incendiary, or destructive device (second or subsequent offense)

24-3-210 Furloughs for qualified inmates of state prison system--failure to return (See Section 24-13-410)

24-13-410(B) Escaping or attempting to escape from prison or possessing tools or weapons used to escape

24-13-470 Inmate throwing bodily fluids on a correctional facility employee

43-35-85(B) Abusing or neglecting a vulnerable adult that results in great bodily injury

43-35-85(D), 16-3-1050(E) Abuse or neglect of a vulnerable adult resulting in great bodily injury

44-53-370(b)(1) Prohibited Acts A, penalties (narcotic drugs in Schedule I (b) and (c), LSD, and Schedule II) first offense

44-53-370 Prohibited Acts A, penalties (g)(2)(a) (distribution of controlled substances with intent to commit a crime) first offense

44-53-375(B)(1) Manufacture, distribution, etc., methamphetamine or cocaine first offense

44-53-445(B)(2) Distribution, manufacture, sale, or possession of crack cocaine within proximity of a school

44-53-577 Unlawful to hire, solicit, direct a person under 17 years of age to transport, conceal, or conduct financial transaction relating to unlawful drug activity

50-21-113(A)(1) Operating a moving water device while under the influence of alcohol or drugs where great bodily injury results

56-5-2945(A)(1) Causing great bodily injury by operating vehicle while under influence of drugs or alcohol

(E) The following offenses are Class E felonies and the maximum terms established for a Class E felony, as set forth in Section 16-1-20(A), apply:

§ 16-3-654 Criminal sexual conduct — Third degree

§ 16-3-656 Assault with intent to commit criminal sexual conduct — Third degree

§ 16-3-820 Promoting, producing, or directing a sexual performance by a child under 18

§ 16-15-355 Disseminating obscene material to a minor 12 years or younger

§ 16-15-395 Sexual exploitation of a minor

§ 16-15-415 Promoting prostitution of a minor

§ 16-17-495(D) Transport of child by physical force or threat of physical force with intent to avoid custody order

§ 63-5-70 Unlawful neglect of child or helpless person by legal custodian

(F) The following offenses are Class F felonies and the maximum terms established for a Class F felony, as set forth in Section 16-1-20(A), apply:

§ 16-3-60 Involuntary manslaughter

§ 16-3-95(B) Inflicting great bodily injury on a child by a person responsible for child's welfare

§ 16-15-120 Buggery

§ 16-15-305(A) Unlawfully disseminating, processing, or promoting obscenity

§ 16-15-335 Unlawful to hire, employ, use, or permit any person under 18 to do anything violating obscenity statutes

§ 16-15-345 Unlawful to disseminate obscene material to any person under 18 years of age

§ 16-15-385 Dissemination of obscene material to minors is unlawful

§ 16-15-387 Employing a person under eighteen to appear in public in the state of sexually explicit nudity

§ 16-15-405(D) Sexual exploitation of a minor — Second degree

§ 16-15-410 Sexual exploitation of a minor — Third degree

§ 16-15-425(C) Participation in the prostitution of a minor

§ 16-17-495(B) Transporting a child under sixteen years of age with the purpose of concealing the child or avoiding a custody order or statute

§ 23-3-470(B)(3) Failure of sex offender to register — Third or subsequent offense

§ 23-3-475(B)(3) Providing false information when registering as a sex offender — Third or subsequent offense

§ 23-3-510(2) Committing a criminal offense by using information obtained from the sex offender registry

§ 16-1-100. Crimes classified as misdemeanors.

(A) The following offenses are Class A misdemeanors and the maximum terms established for a Class A misdemeanor, as set forth in Section 16-1-20(A), apply:

§ 16-15-130 Indecent exposure

§ 16-17-490 Contributing to the delinquency of a minor

§ 16-17-495(C) Returning a child under sixteen years of age within three days of a violation of a custody order or statute

- (B) The following offenses are Class B misdemeanors and the maximum terms established for a Class B misdemeanor, as set forth in Section 16-1-20(A), apply:

[Note: No child abuse related offenses are listed]

- (C) The following offenses are Class C misdemeanors and the maximum terms established for a Class C misdemeanor, as set forth in Section 16-1-20(A), apply:

§ 16-15-50 Seduction under promise of marriage

§ 63-7-940(B) Disseminating protected information relating to child abuse or neglect

§ 23-3-470(B)(2) Failure of sex offender to register--Second offense

§ 23-3-475(B)(2) Providing false information when registering as a sex offender — Second offense

§ 16-1-120. Increased sentences for repeat offenders.

- (1) When an individual, who was convicted of a Class A, B, or C felony offense or an exempt offense which provides for a maximum term of imprisonment of twenty years or more and sentenced to a period of time, has been released from prison, whether on parole or by completion of the sentence, is convicted of another felony offense, the individual shall have added to the sentence imposed for the subsequent conviction such additional time as provided below:
- (A) if the subsequent offense was committed within forty-five days of his release, five years shall be added to the sentence mandated by the subsequent conviction.
 - (B) if the subsequent offense was committed within ninety days of his release, four years shall be added to the sentence mandated by the subsequent conviction.
 - (C) if the subsequent offense was committed within one hundred eighty days of his release, three years shall be added to the sentence mandated by the subsequent conviction.
 - (D) if the subsequent offense was committed within two hundred seventy days of his release, two years shall be added to the sentence mandated by the subsequent conviction.

- (E) if the subsequent offense was committed within three hundred sixty days of his release, one year shall be added to the sentence mandated by the subsequent conviction.
- (2) When subsection (1) requires an individual to have additional time added to the sentence mandated by a subsequent conviction, if the maximum sentence mandated for the subsequent conviction is less than the additional time mandated by subsection (1), the additional time which must be added to the sentence mandated by the subsequent conviction shall be equal to the maximum sentence provided for the conviction.
- (3) No portion of the additional term provided for herein may be suspended and no such additional term may be reduced by any early release program, work credit, or similar program but must be served in full.

Serious and Most Serious Offenses

§ 17-25-45. Life sentence for person convicted for certain crimes.

- (A) Notwithstanding any other provision of law, except in cases in which the death penalty is imposed, upon a conviction for a most serious offense as defined by this section, a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has either:
 - (1) one or more prior convictions for:
 - (a) a most serious offense; or
 - (b) a federal or out-of-state conviction for an offense that would be classified as a most serious offense under this section; or
 - (2) two or more prior convictions for:
 - (a) a serious offense; or
 - (b) a federal or out-of-state conviction for an offense that would be classified as a serious offense under his section.
- (B) Notwithstanding any other provision of law, except in cases in which the death penalty is imposed, upon a conviction for a serious offense as defined by this section, a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has two or more prior convictions for:
 - (1) a serious offense;
 - (2) a most serious offense;

- (3) a federal or out-of-state offense that would be classified as a serious offense or most serious offense under this section; or
- (4) any combination of the offenses listed in items (1), (2), and (3) above.

“(C) As used in this section:

(1) ‘Most serious offense’ means:

16-1-40	Accessory, for any offense enumerated in this item
16-1-80	Attempt, for any offense enumerated in this item
16-3-10	Murder
16-3-29	Attempted Murder
16-3-50	Voluntary manslaughter
16-3-85(A)(1)	Homicide by child abuse
16-3-85(A)(2)	Aiding and abetting homicide by child abuse
16-3-210	Lynching, First degree
16-3-210(B)	Assault and battery by mob, First degree
16-3-620	Assault and battery with intent to kill
16-3-652	Criminal sexual conduct, First degree
16-3-653	Criminal sexual conduct, Second degree
16-3-655	Criminal sexual conduct with minors, except where evidence presented at the criminal proceeding and the court, after the conviction, makes a specific finding on the record that the conviction obtained for this offense resulted from consensual sexual conduct where the victim was younger than the actor, as contained in Section 16-3-655(3)
16-3-656	Assault with intent to commit criminal sexual conduct, first and second degree
16-3-910	Kidnapping
16-3-920	Conspiracy to commit kidnapping
16-3-930	Trafficking in persons
16-3-1075	Carjacking
16-11-110(A)	Arson, First degree
16-11-311	Burglary, First degree
16-11-330(A)	Armed robbery
16-11-330(B)	Attempted armed robbery

16-11-540	Damaging or destroying building, vehicle, or other property by means of explosive incendiary, death results
24-13-450	Taking of a hostage by an inmate
25-7-30	Giving information respecting national or state defense to foreign contacts during war
25-7-40	Gathering information for an enemy
43-35-85(F)	Abuse or neglect of a vulnerable adult resulting in death
55-1-30(3)	Unlawful removing or damaging of airport facility or equipment when death results
56-5-1030(B)(3)	Interference with traffic-control devices or railroad signs or signals prohibited when death results from violation
58-17-4090	Obstruction of railroad, death results.

(2) 'Serious offense' means:

(a) any offense which is punishable by a maximum term of imprisonment for thirty years or more which is not referenced in subsection (C)(1);

(b) those felonies enumerated as follows:

16-3-220	Lynching, second degree
16-3-210(C)	Assault and battery by mob, Second degree
16-3-600(B)	Assault and battery of a high and aggravated nature
16-3-810	Engaging child for sexual performance
16-9-220	Acceptance of bribes by officers
16-9-290	Accepting bribes for purpose of procuring public office
16-11-110(B)	Arson, Second degree
16-11-312(B)	Burglary, Second degree
16-11-380(B)	Theft of a person using an automated teller machine
16-13-210(1)	Embezzlement of public funds
16-13-230(B)(3)	Breach of trust with fraudulent intent
16-13-240(1)	Obtaining signature or property by false pretenses
38-55-540(3)	Insurance fraud
44-53-370(e)	Trafficking in controlled substances
44-53-375(C)	Trafficking in ice, crank, or crack cocaine
44-53-445	
(B)(1) & (2)	Distribute, sell, manufacture, or possess with intent to distribute controlled substances within proximity of school

56-5-2945 Causing death by operating vehicle while under influence of drugs or alcohol; and

(c) the offenses enumerated below:

16-1-40 Accessory before the fact for any of the offenses listed in subitems (a) and (b)

16-1-80 Attempt to commit any of the offenses listed in subitems (a) and (b)

43-35-85(E) Abuse or neglect of a vulnerable adult resulting in great bodily injury.

(3) ‘Conviction’ means any conviction, guilty plea, or plea of nolo contendere.”

(D) Except as provided in this subsection or subsection (E), no person sentenced pursuant to this section shall be eligible for early release or discharge in any form, whether by parole, work release, release to ameliorate prison overcrowding, or any other early release program, nor shall they be eligible for earned work credits, education credits, good conduct credits, or any similar program for early release. A person is eligible for work release if the person is sentenced for voluntary manslaughter (Section 16-3-50), kidnapping (Section 16-3-910), carjacking (Section 16-3-1075), burglary in the second degree (Section 16-11-312(B)), armed robbery (Section 16-11-330(A)), or attempted armed robbery (16-11-330(B)), the crime did not involve any criminal sexual conduct or an additional violent crime as defined in Section 16-1-60, and the person is within three years of release from imprisonment.

(E) For the purpose of this section only, a person sentenced pursuant to this section may be paroled if:

(1) the Department of Corrections requests the Department of Probation, Parole, and Pardon Services to consider the person for parole; and

(2) the Department of Probation, Parole, and Pardon Services determines that due to the person’s health or age he is no longer a threat to society; and

(a) the person has served at least thirty years of the sentence imposed pursuant to this section and has reached at least sixty-five years of age; or

(b) the person has served at least twenty years of the sentence imposed pursuant to this section and has reached at least seventy years of age; or

(c) the person is afflicted with a terminal illness where life expectancy is one year or less; or

(d) the person can produce evidence comprising the most extraordinary circumstances.

- (F) For the purpose of determining a prior or previous conviction under this section and Section 17-25-50, a prior or previous conviction shall mean the defendant has been convicted of a most serious or serious offense, as may be applicable, on a separate occasion, prior to the instant adjudication. There is no requirement that the sentence for the prior or previous conviction must have been served or completed before a sentence of life without parole can be imposed under this section.
- (G) The decision to invoke sentencing under this section is in the discretion of the solicitor.
- (H) Where the solicitor is required to seek or determines to seek sentencing of a defendant under this section, written notice must be given by the solicitor to the defendant and defendant's counsel not less than ten days before trial.

85 Percent Offenses

§ 24-13-150. 85 percent of time served.

- (A) Notwithstanding any other provision of law, except in a case in which the death penalty or a term of life imprisonment is imposed, a prisoner convicted of a "no parole offense" as defined in Section 24-13-100 and sentenced to the custody of the Department of Corrections, including a prisoner serving time in a local facility pursuant to a designated facility agreement authorized by Section 24-3-20, is not eligible for early release, discharge, or community supervision as provided in Section 24-21-560, until the prisoner has served at least eighty-five percent of the actual term of imprisonment imposed. This percentage must be calculated without the application of earned work credits, education credits, or good conduct credits, and is to be applied to the actual term of imprisonment imposed, not including any portion of the sentence which has been suspended. Nothing in this section may be construed to allow a prisoner convicted of murder or a prisoner prohibited from participating in work release, early release, discharge, or community supervision by another provision of law to be eligible for work release, early release, discharge, or community supervision.
- (B) If a prisoner confined in a facility of the department commits an offense or violates one of the rules of the institution during his term of imprisonment, all or part of the credit he has earned may be forfeited in the discretion of the Director of the Department of Corrections. If a prisoner confined in a local correctional facility pursuant to a designated facility agreement commits an offense or violates one of the rules of the institution during his term of imprisonment, all or part of the credit he has earned may be forfeited in the discretion of

the local official having charge of the prisoner. The decision to withhold credits is solely the responsibility of officials named in this subsection.

§ 24-13-100. Definition of no parole offense; classification.

For purposes of definition under South Carolina law, a “no parole offense” means a class A, B, or C felony or an offense exempt from classification as enumerated in Section 16-1-10(d), which is punishable by a maximum term of imprisonment for twenty years or more.

Violent Crimes

§ 16-1-60. Violent crimes defined.

For purposes of definition under South Carolina law, a violent crime includes the offenses of: murder (Section 16-3-10); attempted murder (Section 16-3-29); assault and battery by mob, first degree, resulting in death (Section 16-3-210(B)); criminal sexual conduct in the first and second degree (Sections 16-3-652 and 16-3-653); criminal sexual conduct with minors, first and second degree (Section 16-3-655); assault with intent to commit criminal sexual conduct, first and second degree (Section 16-3-656); assault and battery with intent to kill (Section 16-3-620); assault and battery of a high and aggravated nature (Section 16-3-600(B)); kidnapping (Section 16-3-910); trafficking in persons (Section 16-3-930); voluntary manslaughter (Section 16-3-50); armed robbery (Section 16-11-330(A)); attempted armed robbery (Section 16-11-330(B)); carjacking (Section 16-3-1075); drug trafficking as defined in Section 44-53-370(e) or trafficking cocaine base as defined in Section 44-53-375(C); manufacturing or trafficking methamphetamine as defined in Section 44-53-375; arson in the first degree (Section 16-11-110(A)); arson in the second degree (Section 16-11-110(B)); burglary in the first degree (Section 16-11-311); burglary in the second degree (Section 16-11-312(B)); engaging a child for a sexual performance (Section 16-3-810); homicide by child abuse (Section 16-3-85(A)(1)); aiding and abetting homicide by child abuse (Section 16-3-85(A)(2)); inflicting great bodily injury upon a child (Section 16-3-95(A)); allowing great bodily injury to be inflicted upon a child (Section 16-3-95(B)); criminal domestic violence of a high and aggravated nature (Section 16-25-65); abuse or neglect of a vulnerable adult resulting in death (Section 43-35-85(F)); abuse or neglect of a vulnerable adult resulting in great bodily injury (Section 43-35-85(E)); taking of a hostage by an inmate (Section 24-13-450); detonating a destructive device upon the capitol grounds resulting in death with malice (Section 10-33-325(B)(1)); spousal sexual battery (Section 16-3-615); producing, directing, or promoting sexual performance by a child (Section 16-3-820); lewd act upon a child under sixteen (Section 16-15-140); sexual exploitation of a

minor first degree (Section 16-15-395); sexual exploitation of a minor second degree (Section 16-15-405); promoting prostitution of a minor (Section 16-15-415); participating in prostitution of a minor (Section 16-15-425); aggravated voyeurism (Section 16-17-470(C)); detonating a destructive device resulting in death with malice (Section 16-23-720(A)(1)); detonating a destructive device resulting in death without malice (Section 16-23-720(A)(2)); boating under the influence resulting in death (Section 50-21-113(A)(2)); vessel operator's failure to render assistance resulting in death (Section 50-21-130(A)(3)); damaging an airport facility or removing equipment resulting in death (Section 55-1-30(3)); failure to stop when signaled by a law enforcement vehicle resulting in death (Section 56-5-750(C)(2)); interference with traffic-control devices, railroad signs, or signals resulting in death (Section 56-5-1030(B)(3)); hit and run resulting in death (Section 56-5-1210(A)(3)); felony driving under the influence or felony driving with an unlawful alcohol concentration resulting in death (Section 56-5-2945(A)(2)); putting destructive or injurious materials on a highway resulting in death (Section 57-7-20(D)); obstruction of a railroad resulting in death (Section 58-17-4090); accessory before the fact to commit any of the above offenses (Section 16-1-40); and attempt to commit any of the above offenses (Section 16-1-80). Only those offenses specifically enumerated in this section are considered violent offenses."

Miscellaneous Related Laws

Hepatitis B and HIV Testing

§ 16-3-740. Required testing of certain convicted offenders.

(A) For purposes of this section:

- (1)“Body fluid” means blood, amniotic fluid, pericardial fluid, pleural fluid, synovial fluid, cerebrospinal fluid, semen or vaginal secretions, or any body fluid visibly contaminated with blood.
- (2)“HIV” means the Human Immunodeficiency Virus.
- (3)“Offender” includes adults and juveniles.

(B) Upon the request of a victim who has been exposed to body fluids during the commission of a criminal offense, or upon the request of the legal guardian of a victim who has been exposed to body fluids during the commission of a criminal offense, the solicitor must, within forty-eight hours, excluding weekends and legal holidays as defined in Chapter 5, Title 53, after the offender is charged, or within forty-eight hours, excluding weekends and legal holidays, as defined in Chapter 5, Title 53, after a petition has been filed against an offender in family court, petition the court to have the offender tested for Hepatitis B and HIV. An offender must not be tested under this section for Hepatitis B and HIV without a court order. To obtain a court order, the solicitor must demonstrate the following:

- (1) the victim or the victim’s legal guardian requested the tests;
- (2) there is probable cause that the offender committed the offense;
- (3) there is probable cause that during the commission of the offense there was a risk that body fluids were transmitted from one person to another; and
- (4) the offender has received notice of the petition and notice of his right to have counsel represent him at a hearing.

The results of the tests must be kept confidential and disclosed only to the solicitor who obtained the court order. The solicitor shall then notify only those persons designated in subsection (C).

(C) The tests must be administered by the Department of Health and Environmental Control through the local county health department or the medical professional at the state or local detention facility where the offender is imprisoned or detained. The solicitor shall notify the following persons of the tests results:

- (1) the victim or the legal guardian of a victim who is a minor or is mentally retarded or mentally incapacitated;
- (2) the victim’s attorney;
- (3) the offender and a juvenile offender’s parent or guardian; and
- (4) the offender’s attorney.

The results of the tests shall be provided to the designated recipients with the following disclaimer: “The tests were conducted in a medically approved manner, but tests cannot determine infection by Hepatitis B or HIV with absolute accuracy. Additionally, the testing does not determine exposure to, or infection by, other sexually transmitted diseases. Persons receiving the test results should continue to monitor their own health, seek retesting in approximately six months, and should consult a physician as appropriate”.

The solicitor also shall provide to the state or local correctional facility where the offender is imprisoned or detained and the Department of Health and Environmental Control the test results for HIV and Hepatitis B which indicate that the offender is infected with the disease. The state or local correctional facility where the offender is imprisoned or detained shall use this information solely for the purpose of providing medical treatment to the offender while the offender is imprisoned or detained. The State shall pay for the tests. If the offender is subsequently convicted or adjudicated delinquent, the offender or the parents of an adjudicated offender must reimburse the State for the costs of the tests unless the offender or the parents of the adjudicated offender are determined to be indigent.

If the tests given pursuant to this section indicate infection by Hepatitis B or HIV, the Department of Health and Environmental Control shall be provided with all test results and must provide counseling to the offender regarding the disease, syndrome, or virus. The Department of Health and Environmental Control must provide counseling for the victim, advise the victim of available medical treatment options, refer the victim to appropriate health care and support services, and, at the request of the victim or the legal guardian of a victim, test the victim for HIV and Hepatitis B and provide post-testing counseling to the victim.

(D) At the request of the victim or the victim's legal guardian, the court may order a follow-up HIV test and counseling for the offender if the initial HIV test was negative. The follow-up test and counseling shall be performed on dates that occur six weeks, three months, and six months following the initial test. An order for a follow-up test shall be terminated if the offender obtains an acquittal on, or dismissal of, all charges for which testing was ordered.

(E) If, for any reason, the testing requested under subsection (B) has not been undertaken, upon request of the victim or the victim's legal guardian, the court shall order the offender to undergo testing for Hepatitis B and HIV following conviction or delinquency adjudication. The testing shall be administered by the Department of Health and Environmental Control through the local county health department or the medical professional at the state or local detention facility where the offender is imprisoned or detained. The results shall be disclosed in accordance with the provisions of subsection (C).

(F) Upon a showing of probable cause that the offender committed a crime, the collection of additional samples, including blood, saliva, head or pubic hair may be contemporaneously ordered by the court so that the State may conduct scientific testing, including DNA analysis. The results of the scientific testing, including DNA analysis, may be used for evidentiary purposes in any court proceeding.

(G) Any person or entity who administers tests ordered pursuant to this section and who does so in accordance with this section and accepted medical standards for the administration of these tests shall be immune from civil and criminal liability arising from his conduct.

(H) Any person who discloses information in accordance with the provisions of this section or participates in any judicial proceeding resulting from the disclosure and who does so in good faith and without malice shall have immunity from civil or criminal liability that might otherwise be incurred or imposed in an action resulting from the disclosure.

(I) Results of tests performed pursuant to this section shall not be used as evidence in any criminal trial of the offender except as provided for in subsection (F).

Sex Offender Registration

§ 23-3-400. Purpose.

The intent of this article is to promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens. Notwithstanding this legitimate state purpose, these provisions are not intended to violate the guaranteed constitutional rights of those who have violated our nation's laws.

The sex offender registry will provide law enforcement with the tools needed in investigating criminal offenses. Statistics show that sex offenders often pose a high risk of re-offending. Additionally, law enforcement's efforts to protect communities, conduct investigations, and apprehend offenders who commit sex offenses are impaired by the lack of information about these convicted offenders who live within the law enforcement agency's jurisdiction.

§ 23-3-410. Registry to be operated by State Law Enforcement Division.

The registry is under the direction of the chief of the State Law Enforcement Division (SLED) and shall contain information the chief considers necessary to assist law enforcement in the location of persons convicted of certain offenses. SLED shall develop and operate the registry to collect, analyze, and maintain information; to make information available to every enforcement agency in this State and in other states; and to establish a security system to ensure that only authorized persons may gain access to information gathered under this article.

§ 23-3-420. Promulgation of regulations.

The State Law Enforcement Division shall promulgate regulations to implement the provisions of this article.

§ 23-3-430. Particular convictions rendering person a "sex offender."

(A) Any person, regardless of age, residing in the State of South Carolina who in this State has been convicted of, adjudicated delinquent for, pled guilty or nolo contendere to an offense described below, or who has been convicted, adjudicated delinquent, pled guilty or nolo contendere in any comparable court in the United States, or who has been convicted, adjudicated delinquent, pled guilty or nolo contendere in the United States federal courts of a similar offense, or who has been convicted of, adjudicated delinquent for, pled guilty or nolo contendere to an offense for which the person was required to register in the state

where the conviction or plea occurred, shall be required to register pursuant to the provisions of this article.

- (B) For purposes of this article, a person who remains in this State for a total of thirty days during a twelve-month period is a resident of this State.
- (C) For purposes of this article, a person who has been convicted of, pled guilty or nolo contendere to, or been adjudicated delinquent for any of the following offenses shall be referred to as an offender:
 - (1) criminal sexual conduct in the first degree (Section 16-3-652);
 - (2) criminal sexual conduct in the second degree (Section 16-3-653);
 - (3) criminal sexual conduct in the third degree (Section 16-3-654);
 - (4) criminal sexual conduct with minors, first degree (Section 16-3-655(1));
 - (5) criminal sexual conduct with minors, second degree. If evidence is presented at the criminal proceeding and the court makes a specific finding on the record that the conviction obtained for this offense resulted from consensual sexual conduct, as contained in Section 16-3-655(3) provided the offender is eighteen years of age or less, or consensual sexual conduct between persons under sixteen years of age, the convicted person is not an offender and is not required to register pursuant to the provisions of this article;
 - (6) engaging a child for sexual performance (Section 16-3-810);
 - (7) producing, directing, or promoting sexual performance by a child (Section 16-3-820);
 - (8) criminal sexual conduct: assaults with intent to commit (Section 16-3- 656);
 - (9) incest (Section 16-15-20);
 - (10) buggery (Section 16-15-120);
 - (11) committing or attempting lewd act upon child under sixteen (Section 16- 15-140);
 - (12) peeping, voyeurism, or aggravated voyeurism (Section 16-17-470);
 - (13) violations of Article 3, Chapter 15 of Title 16 involving a minor;
 - (14) a person, regardless of age, who has been convicted, adjudicated delinquent, pled guilty or nolo contendere in this State, or who has been convicted, adjudicated delinquent, pled guilty or nolo contendere in a comparable court in the United States, or who has been convicted, adjudicated delinquent, pled guilty or nolo contendere in

the United States federal courts of indecent exposure or of a similar offense in other jurisdictions is required to register pursuant to the provisions of this article if the court makes a specific finding on the record that based on the circumstances of the case the convicted person should register as a sex offender;

(15) kidnapping (Section 16-3-910) of a person eighteen years of age or older except when the court makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense;

(16) kidnapping (Section 16-3-910) of a person under eighteen years of age except when the offense is committed by a parent;

(17) trafficking in persons (section 16-3-930) except when the court makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense.

(18) criminal sexual conduct when the victim is a spouse (Section 16-3-658);

(19) sexual battery of a spouse (Section 16-3-615);

(20) sexual intercourse with a patient or trainee (Section 44-23-1150).

(21) criminal solicitation of a minor if the purpose or intent of the solicitation or attempted solicitation was to:

(a) persuade, induce, entice, or coerce the person solicited to engage or participate in sexual activity as defined in Section 16-15-375(5);

(b) perform a sexual activity in the presence of the person solicited (Section 16-15-342);
or

(22) administering, distributing, dispensing, delivering, or aiding, abetting, attempting, or conspiring to administer, distribute, dispense, or deliver a controlled substance or gamma hydroxy butyrate to an individual with the intent to commit a crime listed in Section 44-53-370(f), except petit larceny or grand larceny; or

(23) any other offense specified by Title I of the federal Adam Walsh Child Protection and Safety Act of 2006 (Pub. L. 109-248), the Sex Offender Registration and Notification Act (SORNA).

(D) Upon conviction, adjudication of delinquency, guilty plea, or plea of nolo contendere of a person of an offense not listed in this article, the presiding judge may order as a condition of sentencing that the person be included in the sex offender registry if good cause is shown by the solicitor.

- (E) SLED shall remove a person's name and any other information concerning that person from the sex offender registry immediately upon notification by the Attorney General that the person's adjudication, conviction, guilty plea, or plea of nolo contendere for an offense listed in Section 23-3-430(C) was reversed, overturned, or vacated on appeal and a final judgment has been rendered.

§ 23-3-440. Notification of sheriff and SLED of offender's release.

- (1) Prior to an offender's release from the Department of Corrections after completion of the term of imprisonment, or being placed on parole, the Department of Corrections or the Department of Probation, Parole, and Pardon Services, as applicable, shall notify the sheriff of the county where the offender intends to reside and SLED that the offender is being released and has provided an address within the jurisdiction of the sheriff for that county. The Department of Corrections shall provide verbal and written notification to the offender that he must register with the sheriff of the county in which he intends to reside within twenty-four hours of his release. Further, the Department of Corrections shall obtain descriptive information of the offender, including a current photograph prior to release.
- (2) The Department of Probation, Parole, and Pardon Services shall notify SLED and the sheriff of the county where an offender is residing when the offender is sentenced to probation or is a new resident of the State who must be supervised by the department. The Department of Probation, Parole, and Pardon Services also shall provide verbal and written notification to the offender that he must register with the sheriff of the county in which he intends to reside. An offender who is sentenced to probation must register within ten days of sentencing. Further, the Department of Probation, Parole, and Pardon Services shall obtain descriptive information of the offender, including a current photograph that is to be updated annually prior to expiration of the probation sentence.
- (3) The Department of Juvenile Justice shall notify SLED and the sheriff of the county where an offender is residing when the offender is released from a Department of Juvenile Justice facility or when the Department of Juvenile Justice is required to supervise the actions of the juvenile. The Department of Juvenile Justice must provide verbal and written notification to the juvenile and his parent, legal guardian, or custodian that the juvenile must register with the sheriff of the county in which the juvenile resides. The juvenile must register within twenty-four hours of his release or within ten days if he was not confined to a Department of Juvenile Justice's facility. The parents or legal guardian of a person under

seventeen years of age who is required to register under this chapter must ensure that the person has registered.

- (4) The Department of Corrections, the Department of Probation, Parole, and Pardon Services, and the Department of Juvenile Justice shall provide to SLED the initial registry information regarding the offender prior to his release from imprisonment or relief of supervision. This information shall be collected in the event the offender fails to register with his county sheriff.

§ 23-3-450. Offender registration with sheriff of county of residence.

The offender shall register with the sheriff of each county in which he resides, owns real property, is employed, or attends, is enrolled at, volunteers at, interns at, or carries on a vocation at any public or private school, including, but not limited to, a secondary school, adult education school, college or university, and any vocational, technical, or occupational school. To register, the offender must provide information as prescribed by SLED. The sheriff in the county in which the offender resides, owns real property, is employed, or attends, is enrolled at, volunteers at, interns at, or carries on a vocation at any public or private school shall forward all required registration information to SLED within three business days. A copy of this information must be kept by the sheriff's department. The county sheriff shall ensure that all information required by SLED is secured and shall establish specific times of the day during which an offender may register. An offender shall not be considered to have registered until all information prescribed by SLED has been provided to the sheriff. The sheriff in the county in which the offender resides, owns real property, is employed, or attends, is enrolled at, volunteers at, interns at, or carries on a vocation at any public or private school shall notify all local law enforcement agencies, including college or university law enforcement agencies, within three business days of an offender who resides, owns real property, is employed, or attends, is enrolled at, volunteers at, interns at, or carries on a vocation at any public or private school within the local law enforcement agency's jurisdiction.

§ 23-3-460. Bi-annual registration for life; notification of change of address; notification of local law enforcement agencies.

(A) A person required to register pursuant to this article is required to register bi-annually for life. For purposes of this article, 'bi-annually' means each year during the month of his birthday and again during the sixth month following his birth month. The person required to register shall register and must re-register at the sheriff's department in each county where he resides, owns

real property, is employed, or attends any public or private school, including, but not limited to, a secondary school, adult education school, college or university, and any vocational, technical, or occupational school. A person determined by a court to be a sexually violent predator pursuant to state law is required to verify registration and be photographed every ninety days by the sheriff's department in the county in which he resides unless the person is committed to the custody of the State, and verification will be held in abeyance until his release.

(B) A person classified as a Tier III offender by Title I of the federal Adam Walsh Child Protection and Safety Act of 2006 (Pub. L. 109-248), the Sex Offender Registration and Notification Act (SORNA), is required to register every ninety days.

(C) If a person required to register pursuant to this article changes his address within the same county, that person must send written notice of the change of address to the sheriff within three business days of establishing the new residence. If a person required to register under this article owns or acquires real property or is employed within a county in this State, or attends, is enrolled at, volunteers at, interns at, or carries on a vocation at any public or private school, including, but not limited to, a secondary school, adult education school, college or university, and any vocational, technical, or occupational school, he must register with the sheriff in each county where the real property, employment, or the public or private school is located within three business days of acquiring the real property or attending the public or private school.

(D) If a person required to register pursuant to this article changes his permanent or temporary address into another county in South Carolina, the person must register with the county sheriff in the new county within three business days of establishing the new residence. The person must also provide written notice within three business days of the change of address in the previous county to the sheriff with whom the person last registered. For purposes of this subsection, 'temporary address' or 'residence' means the location of the individual's home or other place where the person habitually lives or resides, or where the person lives or resides for a period of ten or more consecutive days. For purposes of this subsection, 'habitually lives or resides' means locations at which the person lives with some regularity.

(E) A person required to register pursuant to this article and who is employed by, attends, is enrolled at, volunteers at, interns at, or carries on a vocation at any public or private school, including, but not limited to, a kindergarten, elementary school, middle school or junior high, high school, secondary school, adult education school, college or university, and any vocational, technical, or occupational school, must provide written notice within three business days of each

change in attendance, enrollment, volunteer status, intern status, employment, or vocation status at any public or private school in this State. For purposes of this subsection, ‘employed and carries on a vocation’ means employment that is full-time or part-time for a period of time exceeding fourteen days or for an aggregate period of time exceeding thirty days during a calendar year, whether financially compensated, volunteered, or for the purpose of government or educational benefit; and ‘student’ means a person who is enrolled on a full-time or part-time basis, in a public or private school, including, but not limited to, a kindergarten, elementary school, middle school or junior high, high school, secondary school, adult education school, college or university, and a vocational, technical, or occupational school.

(F) If a person required to register pursuant to this article moves outside of South Carolina, the person must provide written notice within three business days of the change of address to a new state to the county sheriff with whom the person last registered.

(G) A person required to register pursuant to this article who moves to South Carolina from another state, establishes residence, acquires real property, is employed in, or attends or is enrolled at, volunteers or interns at, or is employed by or carries on a vocation at a public or private school, including, but not limited to, a kindergarten, elementary school, middle school or junior high, high school, secondary school, adult education school, college or university, and a vocational, technical, or occupational school in South Carolina, and is not under the jurisdiction of the Department of Corrections, the Department of Probation, Parole and Pardon Services, the Department of Juvenile Justice, or the Juvenile Parole Board at the time of moving to South Carolina must register within three business days of establishing residence, acquiring real property, gaining employment, or attending or enrolling at, volunteering or interning at, or being employed by or carrying on a vocation at a public or private school in this State.

(H) The sheriff of the county in which the person resides must forward all changes to any information provided by a person required to register pursuant to this article to SLED within three business days.

(I) A sheriff who receives registration information, notification of change of permanent or temporary address, or notification of change in employment, or attendance, enrollment, employment, volunteer status, intern status, or vocation status at a public or private school, including, but not limited to, a kindergarten, elementary school, middle school or junior high, high school, secondary school, adult education school, college or university, and a vocational, technical, or occupational school, must notify all local law enforcement agencies, including

college or university law enforcement agencies, within three business days of an offender whose permanent or temporary address, real property, or public or private school is within the local law enforcement agency's jurisdiction.

(J) The South Carolina Department of Motor Vehicles, shall inform, in writing, any new resident who applies for a driver's license, chauffeur's license, vehicle tag, or state identification card of the obligation of sex offenders to register. The department also shall inform, in writing, a person renewing a driver's license, chauffeur's license, vehicle tag, or state identification card of the requirement for sex offenders to register.

§23-3-465. Residence in campus student housing.

Any person required to register under this article is prohibited from living in campus student housing at a public institution of higher learning supported in whole or in part by the State.

§23-3-470. Failure to register or provide required notifications; penalties.

(A) It is the duty of the offender to contact the sheriff in order to register, provide notification of permanent or temporary change of address, or notification of change of employment, or in attendance, enrollment, employment, volunteer status, intern status, or vocation status at any public or private school, including, but not limited to, a kindergarten, elementary school, middle school or junior high, high school, secondary school, adult education school, college or university, and any vocational, technical, or occupational school. If an offender fails to register, provide notification of change of address, or notification of permanent or temporary change in employment, or attendance, enrollment, employment, volunteer status, intern status, or vocation status at any public or private school, as required by this article, he must be punished as provided in subsection (B).

(B)(1) A person convicted for a first offense is guilty of a misdemeanor and may be fined not more than one thousand dollars or imprisoned for not more than three hundred sixty days, or both. Notwithstanding the provisions of 22-3-540, 22-3-545, 22-3-550, or any other provision of law, a first offense may be tried in magistrates court.

(2) A person convicted for a second offense is guilty of a misdemeanor and must be imprisoned for a mandatory period of three hundred sixty days, no part of which shall be suspended nor probation granted.

(3) A person convicted for a third or subsequent offense is guilty of a felony and must be imprisoned for a mandatory period of five years, three years of which shall not be suspended nor probation granted.

§ 23-3-480. Notice of duty to register.

- (A) An arrest on charges of failure to register, service of an information or complaint for failure to register, or arraignment on charges of failure to register constitutes actual notice of the duty to register. A person charged with the crime of failure to register who asserts as a defense the lack of notice of the duty to register shall register immediately following actual notice through arrest, service, or arraignment. Failure to register after notice as required by this article constitutes grounds for filing another charge of failure to register. Registering following arrest, service, or arraignment on charges does not relieve the offender from the criminal penalty for failure to register before the filing of the original charge.
- (B) Section 23-3-470 shall not apply to a person convicted of an offense provided in Section 23-3-430 prior to July 1, 1994, and who was released from custody prior to July 1, 1994, unless the person has been served notice of the duty to register by the sheriff of the county in which the person resides. This person shall register within ten days of the notification of the duty to register.

§ 23-3-490. Offender registry information available to public.

- (A) Information collected for the offender registry is open to public inspection, upon request to the county sheriff. A sheriff must release information regarding persons required to register under this article to a member of the public if the request is made in writing, on a form prescribed by SLED. The sheriff must provide the person making the request with the full names of the registered sex offenders, any aliases, any other identifying physical characteristics, each offender's date of birth, the home address on file, the offense for which the offender was required to register pursuant to Section 23-3-430, and the date, city, and state of conviction. A photocopy of a current photograph must also be provided. The sheriff must provide to a newspaper with general circulation within the county a listing of the registry for publication.

A sheriff who provides the offender registry for publication or a newspaper which publishes the registry, or any portion of it, is not liable and must not be named as a party in an action to recover damages or seek relief for errors or omissions in the publication of the offender registry; however, if the error or omission was done intentionally, with malice, or in bad faith the sheriff or newspaper is not immune from liability.

- (B) A person may request on a form prescribed by SLED a list of registered sex offenders residing in a city, county, or zip code zone or a list of all registered sex offenders within the

State from SLED. A person may request information regarding a specific person who is required to register under this article from SLED if the person requesting the information provides the name or address of the person about whom the information is sought. SLED shall provide the person making the request with the full names of the requested registered sex offenders, any aliases, any other identifying physical characteristics, each offender's date of birth, the home address on file, the offense for which the offender was required to register pursuant to Section 23-3-430, and the date, city, and state of conviction. The State Law Enforcement Division may charge a reasonable fee to cover the cost of copying and distributing sex offender registry lists as provided for in this section. These funds must be used for the sole purpose of offsetting the cost of providing sex offender registry lists.

- (C) Nothing in subsection (A) prohibits a sheriff from disseminating information contained in subsection (A) regarding persons who are required to register under this article if the sheriff or another law enforcement officer has reason to believe the release of this information will deter criminal activity or enhance public safety. The sheriff shall notify the principals of public and private schools, and the administrator of child day care centers and family day care centers of any offender whose address is within one-half mile of the school or business.
- (D) For purposes of this article, information on a person adjudicated delinquent in family court for an offense listed in Section 23-3-430 must be made available to the public in accordance with the following provisions:
 - (1) If a person has been adjudicated delinquent for committing any of the following offenses, information must be made available to the public pursuant to subsections (A) and (B): (a) criminal sexual conduct in the first degree (Section 16-3-652); (b) criminal sexual conduct in the second degree (Section 16-3-653); (c) criminal sexual conduct with minors, first degree (Section 16-3-655(1)); (d) criminal sexual conduct with minors, second degree (Section 16-3-655(2) and (3)); (e) engaging a child for sexual performance (Section 16-3-810); (f) producing, directing, or promoting sexual performance by a child (Section 16-3-820); (g) kidnapping (Section 16-3-910); or (h) trafficking in persons (Section 16-3-930) expect when the court makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense.
 - (2) Information shall only be made available, upon request, to victims of or witnesses to the offense, public or private schools, child day care centers, family day care centers, businesses or organizations that primarily serve children, women, or vulnerable adults,

as defined in Section 43-35-10(11), for persons adjudicated delinquent for committing any of the following offenses: (a) criminal sexual conduct in the third degree (Section 16-3-654); (b) criminal sexual conduct: assaults with intent to commit (Section 16-3-656); (c) criminal sexual conduct with a minor: assaults with intent to commit (Section 16-3-656); (d) committing or attempting lewd act upon child under sixteen (Section 16-15-140); (e) peeping (Section 16-17-470); (f) incest (Section 16-15-20); (g) buggery (Section 16-15-120); (h) violations of Article 3, Chapter 15 of Title 16 involving a minor, which violations are felonies; or (i) indecent exposure.

- (3) A person who is under twelve years of age at the time of his adjudication, conviction, guilty plea, or plea of nolo contendere for a first offense of any offense listed in Section 23-3-430(C) shall be required to register pursuant to the provisions of this chapter; however, the person's name or any other information collected for the offender registry shall not be made available to the public.
- (4) A person who is under twelve years of age at the time of his adjudication, conviction, guilty plea, or plea of nolo contendere for any offense listed in Section 23-3-430(C) and who has a prior adjudication, conviction, guilty plea, or plea of nolo contendere for any offense listed in Section 23-3-430(C) shall be required to register pursuant to the provisions of this chapter, and all registry information concerning that person shall be made available to the public pursuant to items (1) and (2).
- (5) Nothing in this section shall prohibit the dissemination of all registry information to law enforcement.

(E) For purposes of this section, use of computerized or electronic transmission of data or other electronic or similar means is permitted.

§ 23-3-500. Psychiatric or psychological treatment for children adjudicated for certain sex offenses.

A court must order that a child under twelve years of age who is convicted of, pleads guilty or nolo contendere to, or is adjudicated for an offense listed in Section 23-3-430(C) be given appropriate psychiatric or psychological treatment to address the circumstances of the offense for which the child was convicted, pled guilty or nolo contendere, or adjudicated.

§ 23-3-510. Persons committing criminal offenses using sex offender registry information.

A person who commits a criminal offense using information from the sex offender registry disclosed to him pursuant to Section 23-3-490, upon conviction, must be punished as follows:

- (1) For a misdemeanor offense, the maximum fine prescribed by law for the offense may be increased by not more than one thousand dollars, and the maximum term of imprisonment prescribed by law for the offense may be increased by not more than six months.
- (2) For a felony offense, the maximum term of imprisonment prescribed by law for the offense may be increased by not more than five years.

§ 23-3-520. Immunity.

- (A) An appointed or elected public official, public employee, or public agency is immune from civil liability for damages for any act or omission under this article unless the official's, employee's, or agency's conduct constitutes gross negligence.
- (B) Nothing in this chapter imposes an affirmative duty on a person to disclose to a member of the public information from the sex offender registry other than on those persons responsible for providing registry information pursuant to their official duties as provided for in this chapter.
- (C) Nothing in this section may be construed to mean that information regarding persons on the sex offender registry is confidential except as otherwise provided by law.

§ 23-3-530. Protocol manual for sex offender registry.

The State Law Enforcement Division shall develop and maintain a protocol manual to be used by contributing agencies in the administration of the sex offender registry.

[remainder of statute omitted]

§ 23-3-535. Limitation on places of residence of certain sex offenders; exceptions; violations; local government ordinances; school districts required to provide certain information.

- (A) As contained in this section:

(1) “Children’s recreational facility” means a facility owned and operated by a city, county, or special purpose district used for the purpose of recreational activity for children under the age of eighteen.

(2) “Daycare center” means an arrangement where, at any one time, there are three or more preschool-age children, or nine or more school-age children receiving child care.

(3) “School” does not include a home school or an institution of higher education.

(4) “Within one thousand feet” means a measurement made in a straight line, without regard to intervening structures or objects, from the nearest portion of the property on which the sex offender resides to the nearest property line of the premises of a school, daycare center, children’s recreational facility, park, or public playground, whichever is closer.

(B) It is unlawful for a sex offender who has been convicted of any of the following offenses to reside within one thousand feet of a school, daycare center, children’s recreational facility, park, or public playground:

(1) criminal sexual conduct with a minor, first degree;

(2) criminal sexual conduct with a minor, second degree;

(3) assault with intent to commit criminal sexual conduct with a minor; or

(4) kidnapping a person under eighteen years of age.

(5) trafficking in persons of a person under eighteen years of age except when the court makes a finding on the record that the offense did not include a criminal sexual offense or attempted criminal sexual offense.

(C) This section does not apply to a sex offender who:

(1) resided within one thousand feet of a school, daycare center, children’s recreational facility, park, or public playground before the effective date of this act;

(2) resided within one thousand feet of a school, daycare center, children’s recreational facility, park, or public playground on property the sex offender owned before the sex offender was charged with any of the offenses enumerated in subsection (B);

(3) resides within one thousand feet of a school, daycare center, children’s recreational facility, park, or public playground as a result of the establishment of a new school, daycare center, children’s recreational facility, park, or public playground;

(4) resides in a jail, prison, detention facility, group home for persons under the age of twenty-one licensed by the Department of Social Services, residential treatment facility for persons under the age of twenty-one licensed by the Department of Health and Environmental Control, or other holding facility, including a mental health facility;

(5) resides in a homeless shelter for no more than one year, a group home for persons under the age of twenty-one licensed by the Department of Social Services, or a residential treatment facility for persons under the age of twenty-one licensed by the Department of Health and Environmental Control, and the site was purchased by the organization prior to the effective date of this act;

(6) resides in a community residential care facility, as defined in Section 44-7-130(6); or

(7) resides in a nursing home, as defined in Section 44-7-130(13).

(D) If upon registration of a sex offender, or at any other time, a local law enforcement agency determines that a sex offender is in violation of this section, the local law enforcement agency must, within thirty days, notify the sex offender of the violation, provide the sex offender with a list of areas in which the sex offender is not permitted to reside, and notify the sex offender that the sex offender has thirty days to vacate the residence. If the sex offender fails to vacate the residence within thirty days, the sex offender must be punished as follows:

(1) for a first offense, the sex offender is guilty of a misdemeanor and, upon conviction, must be imprisoned not more than thirty days, or fined not more than five hundred dollars, or both;

(2) for a second offense, the sex offender is guilty of a misdemeanor and, upon conviction, must be imprisoned not more than three years, or fined not more than one thousand dollars, or both;

(3) for a third or subsequent offense, the sex offender is guilty of a felony and, upon conviction, must be imprisoned for not more than five years, or fined not more than five thousand dollars, or both.

(E) A local government may not enact an ordinance that contains penalties that exceed or are less lenient than the penalties contained in this section.

(F)(1) At the beginning of each school year, each school district must provide:

(a) the names and addresses of every sex offender who resides within one thousand feet of a school bus stop within the school district to the parents or guardians of a student who boards or disembarks a school bus at a stop covered by this subsection; or

(b) the hyperlink to the sex offender registry web site on the school district's web site for the purpose of gathering this information.

(2) Local law enforcement agencies must check the school districts' web sites to determine if each school district has complied with this subsection. If a hyperlink does not appear on a school district web site, the local law enforcement agency must contact the school district to confirm that the school district has provided the parents or guardians with the names and addresses of every sex offender who resides within one thousand feet of a school bus stop within the school district. If the local law enforcement agency determines that this information has not

been provided, the local law enforcement agency must inform the school district that it is in violation of this subsection. If the school district does not comply within thirty days after notice of its violation, the school district is subject to equitable injunctive relief and, if the plaintiff prevails, the district shall pay the plaintiff's attorney's fees and costs.

§ 23-3-540. Electronic monitoring.

(A) Upon conviction, adjudication of delinquency, guilty plea, or plea of nolo contendere of a person for committing criminal sexual conduct with a minor in the first degree, pursuant to Section 16-3-655(A)(1), or committing or attempting a lewd act upon a child under sixteen, pursuant to Section 16-15-140, the court must order that the person, upon release from incarceration, confinement, commitment, institutionalization, or when placed under the supervision of the Department of Probation, Parole and Pardon Services shall be monitored by the Department of Probation, Parole and Pardon Services with an active electronic monitoring device.

(B) Upon conviction, adjudication of delinquency, guilty plea, or plea of nolo contendere of a person for any other offense listed in subsection (G), the court may order that the person upon release from incarceration, confinement, commitment, institutionalization, or when placed under the supervision of the Department of Probation, Parole and Pardon Services shall be monitored by the Department of Probation, Parole and Pardon Services with an active electronic monitoring device.

(C) A person who is required to register pursuant to this article for committing criminal sexual conduct with a minor in the first degree, pursuant to Section 16-3-655(A)(1), or committing or attempting a lewd act upon a child under sixteen, pursuant to Section 16-15-140, and who violates a term of probation, parole, community supervision, or a community supervision program must be ordered by the court or agency with jurisdiction to be monitored by the Department of Probation, Parole and Pardon Services with an active electronic monitoring device.

(D) A person who is required to register pursuant to this article for any other offense listed in subsection (G), and who violates a term of probation, parole, community supervision, or a community supervision program, may be ordered by the court or agency with jurisdiction to be monitored by the Department of Probation, Parole and Pardon Services with an active electronic monitoring device.

(E) A person who is required to register pursuant to this article for committing criminal sexual conduct with a minor in the first degree, pursuant to Section 16-3-655(A)(1), or committing or

attempting a lewd act upon a child under sixteen, pursuant to Section 16-15-140, and who violates a provision of this article, must be ordered by the court to be monitored by the Department of Probation, Parole and Pardon Services with an active electronic monitoring device.

(F) A person who is required to register pursuant to this article for any other offense listed in subsection (G), and who violates a provision of this article, may be ordered by the court to be monitored by the Department of Probation, Parole and Pardon Services with an active electronic monitoring device.

[remainder of statute omitted]

§ 23-3-545. Effect of conviction of wilfully violating term or condition of active electronic monitoring.

(A) If a person is convicted of wilfully violating a term or condition of active electronic monitoring pursuant to Section 23-3-540(M), the court may impose other terms and conditions considered appropriate and may continue the person on active electronic monitoring, or the court may revoke the active electronic monitoring and impose a sentence of up to ten years for the violation. A person who is incarcerated for a revocation is eligible to earn work credits, education credits, good conduct credits, and other credits which would reduce the sentence for the violation to the same extent he would have been eligible to earn credits on a sentence of incarceration for the underlying conviction. A person who is incarcerated for a revocation pursuant to the provisions of this subsection is not eligible for parole.

(B) If a person's electronic monitoring is revoked by the court and the court imposes a period of incarceration for the revocation, the person must be placed back on active electronic monitoring when the person is released from incarceration.

(C) A person may be sentenced for successive revocations, with each revocation subject to a ten-year sentence. The maximum aggregate amount of time the person may be required to serve when sentenced for successive revocations may not exceed the period of time the person is required to remain on the sex offender registry.

§ 23-3-555. Electronic Securing and Targeting of Online Predators Act.

(1) 'Interactive computer service' means an information service, system, or access software provider that offers users the capability of generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via an Internet access provider, including a service or system that provides or enables computer access by multiple users to a

computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(2) 'Internet access provider' means a business, organization, or other entity providing directly to consumers a computer and communications facility through which a person may obtain access to the Internet. An Internet access provider does not include a business, organization, or other entity that provides only telecommunications services, cable services, or video services, or any system operated or services offered by a library or educational institution.

(3) 'Internet identifier' means an electronic mail address, user name, screen name, or similar identifier used for the purpose of Internet forum discussions, Internet chat room discussions, instant messaging, social networking, or similar Internet communication.

(B)(1) A sex offender who is required to register with the sex offender registry pursuant to this article must provide, upon registration and each re-registration, information regarding the offender's Internet accounts with Internet access providers and the offender's Internet identifiers.

(2) A sex offender who is required to register with the sex offender registry pursuant to this article and who changes an Internet account with an Internet access provider or changes an Internet identifier must send written notice of the change to the appropriate sheriff within three business days of changing the Internet account or Internet identifier. A sheriff who receives notification of change of an Internet account or Internet identifier must notify the South Carolina Law Enforcement Division (SLED) within three business days.

(3) A sex offender who fails to provide Internet account or Internet identifier information, or who fails to provide notification of change of an Internet account or an Internet identifier, must be punished as provided for in Section 23-3-470. An offender who knowingly and willfully gives false information regarding an Internet account or Internet identifier must be punished as provided for in Section 23-3-475.

(C)(1) An interactive computer service may request from SLED, on a form prescribed by SLED, a list of all registered sex offenders or information regarding specific registered sex offenders. In order to receive such information, the interactive computer service must provide identifying information as prescribed by SLED, including, but not limited to, the name, address, telephone number, legal nature, and corporate form of the interactive computer service.

(2) SLED must release information requested by an interactive computer service, including, but not limited to, the full names of the registered sex offenders, any aliases, any other identifying characteristics, each offender's date of birth, the home address on file, the offense for which the offender was required to register pursuant to Section 23-3-430, the date, city, and state

of conviction, and any Internet identifiers. A photocopy of a current photograph must also be provided.

(3) SLED may charge a reasonable fee to cover the cost of copying and distributing information as provided for in this section. These funds must be used for the sole purpose of offsetting the cost of providing such information.

(4) SLED is not liable and must not be named as a party in an action to recover damages or seek relief for errors or omissions related to the distribution of information pursuant to this section; however, if the error or omission was done intentionally, with malice, or in bad faith, SLED is not immune from liability.

(5) The interactive computer service may use the information obtained from SLED to prescreen persons wanting to register for its service, identify sex offenders wanting to register for its service or using its service, prevent sex offenders from registering for its service, block sex offenders from using its service, disable sex offenders from using its service, remove sex offenders from its service, or to advise law enforcement or other governmental entities of potential violations of law or threats to public safety. An interactive computer service must not publish or in any way disclose or re-disclose any information provided to the interactive computer service by SLED. A person who commits a criminal offense using information disclosed to the person pursuant to this section must be punished as provided for in Section 23-3-520.

(6) An interactive computer service is not liable and must not be named as a party in an action to recover damages or seek relief for:

- (a) making or not making a request for information as permitted by this section;
- (b) prescreening or not prescreening a person wanting to register for its service;
- (c) identifying, blocking, or otherwise preventing a person from registering for its service based on a good faith belief that such person's Internet account information or Internet identifier appears in the information obtained from SLED, the National Sex Offender Registry, or any analogous state registry;
- (d) not identifying, blocking, or otherwise preventing a person from registering for its service whose Internet account information or Internet identifier appears in the information obtained from SLED, the National Sex Offender Registry, or any analogous state registry;
- (e) identifying, blocking, disabling, removing, or otherwise affecting a user based on a good faith belief that such user's Internet account information or Internet identifier appears in the information obtained from SLED, the National Sex Offender Registry, or any analogous state registry;

(f) not identifying, blocking, disabling, removing, or otherwise affecting a user, whose Internet account information or Internet identifier appears in the information obtained from SLED, the National Sex Offender Registry, or any analogous state registry; or

(g) using or not using the information obtained from SLED to advise law enforcement or other governmental entities of potential violations of law or threats to public safety.

(D) If a person commits a sexual offense in which the victim is under the age of eighteen at the time of the offense or the person reasonably believes is under the age of eighteen at the time of the offense, and the offender is required to register with the sex offender registry for the offense, then, upon conviction, adjudication of delinquency, guilty plea, or plea of nolo contendere, the judge must order as a condition of probation or parole that the person is prohibited from using the Internet to access social networking websites, communicate with other persons or groups for the purpose of promoting sexual relations with persons under the age of eighteen, and communicate with a person under the age of eighteen when the person is over the age of eighteen. The judge may permit a person to use the Internet to communicate with a person under the age of eighteen when such a person is the parent or guardian of a child under the age of eighteen, or the grandparent of a grandchild under the age of eighteen, and the person is not otherwise prohibited from communicating with the child or grandchild.

Sexually Violent Predators

§ 44-48-20. Legislative findings.

The General Assembly finds that a mentally abnormal and extremely dangerous group of sexually violent predators exists who require involuntary civil commitment in a secure facility for long-term control, care, and treatment. The General Assembly further finds that the likelihood these sexually violent predators will engage in repeat acts of sexual violence if not treated for their mental conditions is significant. Because the existing civil commitment process is inadequate to address the special needs of sexually violent predators and the risks that they present to society, the General Assembly determines that a separate, involuntary civil commitment process for the long-term control, care, and treatment of sexually violent predators is necessary. The General Assembly also determines that, because of the nature of the mental conditions from which sexually violent predators suffer and the dangers they present, it is necessary to house involuntarily committed sexually violent predators in secure facilities separated from persons involuntarily committed under traditional civil commitment statutes. The civil commitment of sexually violent predators is not intended to stigmatize the mentally ill community.

§ 44-48-30. Definitions.

For purposes of this chapter:

- (1) “Sexually violent predator” means a person who: (a) has been convicted of a sexually violent offense; and (b) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.
- (2) “Sexually violent offense” means:
 - (a) criminal sexual conduct in the first degree, as provided in Section 16- 3-652;
 - (b) criminal sexual conduct in the second degree, as provided in Section 16- 3-653;
 - (c) criminal sexual conduct in the third degree, as provided in Section 16- 3-654;
 - (d) criminal sexual conduct with minors in the first degree, as provided in Section 16-3-655(1);
 - (e) criminal sexual conduct with minors in the second degree, as provided in Section 16-3-655(2) and (3);

- (f) engaging a child for a sexual performance, as provided in Section 16-3- 810;
 - (g) producing, directing, or promoting sexual performance by a child, as provided in Section 16-3-820;
 - (h) assault with intent to commit criminal sexual conduct, as provided in Section 16-3-656;
 - (i) incest, as provided in Section 16-15-20;
 - (j) buggery, as provided in Section 16-15-120;
 - (k) committing or attempting lewd act upon child under sixteen, as provided in Section 16-15-140;
 - (l) violations of Article 3, Chapter 15 of Title 16 involving a minor when the violations are felonies;
 - (m) accessory before the fact to commit an offense enumerated in this item and as provided for in Section 16-1-40;
 - (n) attempt to commit an offense enumerated in this item as provided by Section 16-1-80;
 - (o) any offense for which the judge makes a specific finding on the record that based on the circumstances of the case, the person's offense should be considered a sexually violent offense.
- (3) "Mental abnormality" means a mental condition affecting a person's emotional or volitional capacity that predisposes the person to commit sexually violent offenses.
 - (4) "Sexually motivated" means that one of the purposes for which the person committed the crime was for the purpose of the person's sexual gratification.
 - (5) "Agency with jurisdiction" means that agency which, upon lawful order or authority, releases a person serving a sentence or term of confinement and includes the South Carolina Department of Corrections, the South Carolina Department of Probation, Parole, and Pardon Services, the Board of Probation, Parole, and Pardon Services, the Department of Juvenile Justice, the Juvenile Parole Board, and the Department of Mental Health.
 - (6) "Convicted of a sexually violent offense" means a person has: (a) pled guilty to, pled nolo contendere to, or been convicted of; (b) been adjudicated delinquent as a result of the commission of; (c) been charged but determined to be incompetent to stand trial for; (d) been found not guilty by reason of insanity of; or (e) been found guilty but mentally ill of a sexually violent offense.

- (7) “Court” means the court of common pleas.
- (8) “Total confinement” means incarceration in a secure state or local correctional facility and does not mean any type of community supervision.
- (9) “Likely to engage in acts of sexual violence” means the person’s propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others.
- (10) “Person” means an individual who is a potential or actual subject of proceedings under this act and includes a child under seventeen years of age.

§ 44-48-40. Notification to team and attorney general regarding release.

- (A) If a person has been convicted of a sexually violent offense, the agency with jurisdiction shall give written notice to the multidisciplinary team established in Section 44-48-50, the victim, and the Attorney General at least two hundred seventy days before:
 - (1) the person’s anticipated release from total confinement, except that in the case of a person who is returned to prison for no more than two hundred seventy days as a result of a revocation of any type of community supervision program, written notice must be given as soon as practicable following the person’s readmission to prison;
 - (2) the anticipated hearing on fitness to stand trial following notice under Section 44-23-460 of a person who has been charged with a sexually violent offense but who was found unfit to stand trial for the reasons set forth in Section 44-23-410 following a hearing held pursuant to Section 44-23-430;
 - (3) the anticipated hearing pursuant to Section 17-24-40(C) of a person who has been found not guilty by reason of insanity of a sexually violent offense; or
 - (4) release of a person who has been found guilty of a sexually violent offense but mentally ill pursuant to Section 17-24-20.
- (B) If a person has been convicted of a sexually violent offense and the Board of Probation, Parole, and Pardon Services or the Board of Juvenile Parole intends to grant the person a parole or the South Carolina Department of Corrections or the Board of Juvenile Parole intends to grant the person a conditional release, the parole or the conditional release must be granted to be effective one hundred eighty days after the date of the order of parole or conditional release. The Board of Probation, Parole, and Pardon Services, the Board of Juvenile Parole, or the South Carolina Department of Corrections immediately must send notice of the parole or conditional release of the person to the multidisciplinary team, the

victim, and the Attorney General. If the person is determined to be a sexually violent predator pursuant to this chapter, the person shall be subject to the provisions of this chapter even though the person has been released on parole or conditional release.

- (C) The agency with jurisdiction shall inform the multidisciplinary team and the Attorney General of: (1) the person's name, identifying factors, anticipated future residence, and offense history; and (2) documentation of institutional adjustment and any treatment received.
- (D) The agency with jurisdiction, its employees, officials, individuals contracting, appointed, or volunteering to perform services under this chapter, the multidisciplinary team, and the prosecutor's review committee established in Section 44-48-60 are immune from civil or criminal liability for any good-faith conduct under this act.

§ 44-48-50. Multidisciplinary team.

The Director of the Department of Corrections shall appoint a multidisciplinary team to review the records of each person referred to the team pursuant to Section 44-48-40. These records may include, but are not limited to, the person's criminal offense record, any relevant medical and psychological records, treatment records, and any disciplinary or other records formulated during confinement or supervision. The team, within thirty days of receiving notice as provided for in Section 44-48-40, shall assess whether or not the person satisfies the definition of a sexually violent predator. If it is determined that the person satisfies the definition of a sexually violent predator, the multidisciplinary team must forward a report of the assessment to the prosecutor's review committee. The assessment must be accompanied by all records relevant to the assessment. Membership of the team must include: (1) a representative from the Department of Corrections; (2) a representative from the Department of Probation, Parole, and Pardon Services; (3) a representative from the Department of Mental Health who is a trained, qualified mental health clinician with expertise in treating sexually violent offenders; (4) a retired judge appointed by the Chief Justice who is eligible for continued judicial service pursuant to Section 2-19-100; and (5) the Chief Attorney of the Office of Appellate Defense or his designee.

The Director of the Department of Corrections or his designee shall be the chairman of the team.

§ 44-48-60. Prosecutor's review committee.

The Attorney General shall appoint a prosecutor's review committee to review the report and records of each person referred to the committee by the multidisciplinary team. The prosecutor's review committee shall determine whether or not probable cause exists to believe the person is a

sexually violent predator. The prosecutor's review committee shall make the probable cause determination within thirty days of receiving the report and records from the multidisciplinary team. The prosecutor's review committee shall include, but not be limited to, a member of the staff of the Attorney General, an elected circuit solicitor, and a victim's representative. The Attorney General or his designee shall be the chairman of the committee. In addition to the records and reports considered pursuant to Section 44-48-50, the committee shall also consider information provided by the circuit solicitor who prosecuted the person.

§ 44-48-70. Petition for probable cause determination.

When the prosecutor's review committee has determined that probable cause exists to support the allegation that the person is a sexually violent predator, the Attorney General may file a petition with the court in the jurisdiction where the person committed the offense. The petition, which must be filed within thirty days of the probable cause determination by the prosecutor's review committee, shall request that the court make a probable cause determination as to whether the person is a sexually violent predator. The petition must allege that the person is a sexually violent predator and must state sufficient facts that would support a probable cause allegation.

§ 44-48-80. Determination of probable cause.

- (A) Upon filing of a petition, the court shall determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator. If the court determines that probable cause exists to believe that the person is a sexually violent predator, the person must be taken into custody if he is not already confined in a secure facility.
- (B) Immediately upon being taken into custody pursuant to subsection (A), the person must be provided with notice of the opportunity to appear in person at a hearing to contest probable cause as to whether the detained person is a sexually violent predator. This hearing must be held within seventy-two hours after a person is taken into custody pursuant to subsection (A). At this hearing the court shall: (1) verify the detainee's identity; (2) receive evidence and hear argument from the person and the Attorney General; and (3) determine whether probable cause exists to believe that the person is a sexually violent predator.

The State may rely upon the petition and supplement the petition with additional documentary evidence or live testimony.

- (C) At the probable cause hearing as provided in subsection (B), the detained person has the following rights in addition to any rights previously specified: (1) to be represented by

counsel; (2) to present evidence on the person's behalf; (3) to cross-examine witnesses who testify against the person; and (4) to view and copy all petitions and reports in the court file.

- (D) If the probable cause determination is made, the court must direct that upon completion of the criminal sentence, the person must be transferred to a local or regional detention facility pending conclusion of the proceedings under this chapter. The court must further direct that the person be transported to an appropriate facility of the South Carolina Department of Mental Health for an evaluation as to whether the person is a sexually violent predator. The evaluation must be conducted by a qualified expert appointed by the court at the probable cause hearing. The expert must complete the evaluation within sixty days after the completion of the probable cause hearing. The court may grant one extension upon request of the expert and a showing of good cause. Any further extensions only may be granted for extraordinary circumstances.

§ 44-48-90. Trial.

- (A) The court must conduct a trial to determine whether the person is a sexually violent predator.
- (B) Within thirty days after the determination of probable cause by the court pursuant to Section 44-48-80, the person or the Attorney General may request, in writing, that the trial be before a jury. If no request is made, the trial must be before a judge in the county where the offense was committed within ninety days of the date the court appointed expert issues the evaluation as to whether the person is a sexually violent predator, pursuant to Section 44-48-80(D), or, if there is no term of court, the next available date thereafter. If a request is made, the court must schedule a trial before a jury in the county where the offense was committed within ninety days of the date the court appointed expert issues the evaluation as to whether the person is a sexually violent predator, pursuant to Section 44-48-80(D), or, if there is no term of court, the next available date thereafter. The trial may be continued upon the request of either party and a showing of good cause, or by the court on its own motion in the due administration of justice, and only if the respondent will not be substantially prejudiced. The Attorney General must notify the victim, in a timely manner, of the time, date, and location of the trial. At all stages of the proceedings under this chapter, a person subject to this chapter is entitled to the assistance of counsel, and if the person is indigent, the court must appoint counsel to assist the person.

- (C) Upon receipt of the evaluation issued by the court appointed expert as to whether the person is a sexually violent predator pursuant to Section 44-48-80(D), the person or the Attorney General may retain a qualified expert to perform a subsequent examination. All examiners are permitted to have reasonable access to the person for the purpose of the examination, as well as access to all relevant medical, psychological, criminal offense, and disciplinary records and reports. In the case of an indigent person who would like an expert of his own choosing, the court must determine whether the services are necessary. If the court determines that the services are necessary and the expert's requested compensation for the services is reasonable, the court must assist the person in obtaining the expert to perform an examination or participate in the trial on the person's behalf. The court must approve payment for the services upon the filing of a certified claim for compensation supported by a written statement specifying the time expended, services rendered, expenses incurred on behalf of the person, and compensation received in the case or for the same services from any other source."

§ 44-48-100. Standard for determining predator status.

- (A) The court or jury must determine whether, beyond a reasonable doubt, the person is a sexually violent predator. If a jury determines that the person is a sexually violent predator, the determination must be by unanimous verdict. If the court or jury determines that the person is a sexually violent predator, the person must be committed to the custody of the Department of Mental Health for control, care, and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large and has been released pursuant to this chapter. The control, care, and treatment must be provided at a facility operated by the Department of Mental Health. At all times, a person committed for control, care, and treatment by the Department of Mental Health pursuant to this chapter must be kept in a secure facility, and the person must be segregated at all times from other patients under the supervision of the Department of Mental Health. The Department of Mental Health may enter into an interagency agreement with the Department of Corrections for the control, care, and treatment of these persons. A person who is in the confinement of the Department of Corrections pursuant to an interagency agreement authorized by this chapter must be kept in a secure facility and must, if practical and to the degree possible, be housed and managed separately from offenders in the custody of the Department of Corrections. If the court or jury is not satisfied beyond a reasonable doubt that the person is a sexually violent predator, the court must direct the person's release.

Upon a mistrial, the court must direct that the person be held at a local or regional detention facility until another trial is conducted. A subsequent trial following a mistrial must be held within ninety days of the previous trial, unless the subsequent trial is continued. The court or jury's determination that a person is a sexually violent predator may be appealed. The person must be committed to the custody of the Department of Mental Health pending his appeal.

- (B) If the person charged with a sexually violent offense has been found incompetent to stand trial and is about to be released and the person's commitment is sought pursuant to subsection (A), the court first shall hear evidence and determine whether the person committed the act or acts with which he is charged. The hearing on this issue must comply with all the procedures specified in this section. In addition, the rules of evidence applicable in criminal cases apply, and all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, apply. After hearing evidence on this issue, the court shall make specific findings on whether the person committed the act or acts with which he is charged; the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on the person's own behalf; the extent to which the evidence could be reconstructed without the assistance of the person; and the strength of the prosecution's case. If, after the conclusion of the hearing on this issue, the court finds beyond a reasonable doubt that the person committed the act or acts with which he is charged, the court shall enter a final order, appealable by the person, on that issue, and may proceed to consider whether the person should be committed pursuant to this chapter.

§ 44-48-110. Periodic mental examination of committed persons.

A person committed pursuant to this chapter shall have an examination of his mental condition performed once every year. The person may retain or, if the person is indigent and so requests, the court may appoint a qualified expert to examine the person, and the expert shall have access to all medical, psychological, criminal offense, and disciplinary records and reports concerning the person. The annual report must be provided to the court which committed the person pursuant to this chapter, the Attorney General, the solicitor who prosecuted the person, and the multidisciplinary team. The court shall conduct an annual hearing to review the status of the committed person. The committed person shall not be prohibited from petitioning the court for release at this hearing. The Director of the Department of Mental Health shall provide the

committed person with an annual written notice of the person's right to petition the court for release over the director's objection; the notice shall contain a waiver of rights. The director shall forward the notice and waiver form to the court with the annual report. The committed person has a right to have an attorney represent him at the hearing, but the committed person is not entitled to be present at the hearing. If the court determines that probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is safe to be at large and, if released, is not likely to commit acts of sexual violence, the court shall schedule a trial on the issue. At the trial, the committed person is entitled to be present and is entitled to the benefit of all constitutional protections that were afforded the person at the initial commitment proceeding. The Attorney General shall represent the State and has the right to have the committed person evaluated by qualified experts chosen by the State. The trial must be before a jury if requested by either the person, the Attorney General, or the solicitor. The committed person also has the right to have qualified experts evaluate the person on the person's behalf, and the court shall appoint an expert if the person is indigent and requests the appointment. The burden of proof at the trial is upon the State to prove beyond a reasonable doubt that the committed person's mental abnormality or personality disorder remains such that the person is not safe to be at large and, if released, is likely to engage in acts of sexual violence.

§ 44-48-120. Petition of release.

(A) If the Director of the Department of Mental Health determines that the person's mental abnormality or personality disorder has so changed that the person is safe to be at large and, if released, is not likely to commit acts of sexual violence, the director must certify such determination in writing with the specific basis thereof, authorize the person to petition the court for release, and notify the Attorney General for certification and authorization. The petition must be served upon the court and the Attorney General. The Attorney General must notify the victim of the proceeding.

(B) The court, upon receipt of the petition for release, shall order a hearing within thirty days unless the Attorney General requests an examination by a qualified expert as to whether the petitioner's mental abnormality or personality disorder has so changed that the petitioner is safe to be at large and, if released, is not likely to commit acts of sexual violence, or the petitioner or the Attorney General requests a trial before a jury. The Attorney General must represent the State and has the right to have the petitioner examined by qualified experts chosen by the State. If the Attorney General retains a qualified expert who concludes that the petitioner's mental abnormality or personality disorder remains such that the petitioner is not safe to be at large and, if

released, is likely to commit acts of sexual violence, the petitioner may retain a qualified expert of his own choosing to perform a subsequent examination. In the case of an indigent petitioner who would like an expert of his own choosing, the court must determine whether services are necessary. If the court determines that the services are necessary and the expert's requested compensation for the services is reasonable, the court must assist the petitioner in obtaining the expert to perform an examination or participate in the hearing or trial on the petitioner's behalf. The court must approve payment for the services upon the filing of a certified claim for compensation supported by a written statement specifying the time expended, services rendered, expenses incurred on behalf of the petitioner, and compensation received in the case or for the same services from another source. The burden of proof is upon the Attorney General to show beyond a reasonable doubt that the petitioner's mental abnormality or personality disorder remains such that the petitioner is not safe to be at large and, that if released, is likely to commit acts of sexual violence.

§ 44-48-130. Grounds for denial of petition for release.

Nothing in this chapter shall prohibit a person from filing a petition for release pursuant to this chapter. However, if a person has previously filed a petition for release without the approval of the Director of the Department of Mental Health and the court determined either upon review of the petition or following a hearing that the petitioner's petition was frivolous or that the petitioner's condition had not changed so that the petitioner was not safe to be at large and, if released, would commit acts of sexual violence, then the court shall deny the subsequent petition unless the petition contains facts upon which a court could find the condition of the petitioner had so changed that a hearing was warranted. Upon receipt of a first or subsequent petition from a committed person without the director's approval, the court shall, whenever possible, review the petition and determine if the petition is based upon frivolous grounds and, if so, shall deny the petition without a hearing.

§ 44-48-140. Restricted release of confidential information and records to agencies and Attorney General.

In order to protect the public, relevant information and records which otherwise are confidential or privileged must be released to the agency with jurisdiction and the Attorney General for the purpose of meeting the notice requirements of Section 44-48-40 and determining whether a person is or continues to be a sexually violent predator.

§ 44-48-150. Evidentiary records; court order to open sealed records.

Psychological reports, drug and alcohol reports, treatment records, reports of the diagnostic center, medical records, or victim impact statements which have been submitted to the court or admitted into evidence under this chapter must be part of the record but must be sealed and opened only on order of the court.

§ 44-48-160. Registration of persons released from commitment.

A person released from commitment pursuant to this chapter must register pursuant to and comply with the requirements of Article 7, Chapter 3 of Title 23.

§ 44-48-170. Involuntary detention or commitment.

The involuntary detention or commitment of a person pursuant to this chapter shall conform to constitutional requirements for care and treatment.

Criminal Procedure and Evidence

§ 16-3-657. Corroboration not required.

The testimony of the victim need not be corroborated in prosecutions under §§ 16-3-652 through 16-3-658.

§ 16-3-659. Presumption abolished.

The common law rule that a boy under fourteen years is conclusively presumed to be incapable of committing the crime of rape shall not be enforced in this State. Provided, that any person under the age of 14 shall be tried as a juvenile for any violations of §§ 16-3-651 to 16-3-659.1.

§ 16-3-659.1. Rape shield statute.

- (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct is not admissible in prosecutions under Sections 16- 3-615 and 16-3-652 to 16-3-656; however, evidence of the victim's sexual conduct with the defendant or evidence of specific instances of sexual activity with persons other than the defendant introduced to show source or origin of semen, pregnancy, or disease about which evidence has been introduced previously at trial is admissible if the judge finds that such evidence is relevant to a material fact and issue in the case and that its inflammatory or prejudicial nature does not outweigh its

probative value. Evidence of specific instances of sexual activity which would constitute adultery and would be admissible under rules of evidence to impeach the credibility of the witness may not be excluded.

- (2) If the defendant proposes to offer evidence described in subsection (1), the defendant, prior to presenting his defense shall file a written motion and offer of proof. The court shall order an in-camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new evidence is discovered during the presentation of the defense that may make the evidence described in subsection (1) admissible, the judge may order an in-camera hearing to determine whether the proposed evidence is admissible under subsection (1).

§ 16-3-660. Deposition testimony of rape victim or victim of assault with intent to ravish.

Before or during the trial of a person charged with rape or assault with intent to ravish, when the female who is alleged to have been assaulted is a witness, the judge of the court in which the case is to be tried may, in his discretion, by an order direct that the deposition of such witness be taken at a time and place designated in such order within the county in which the trial is to be had upon such notice to the accused as the judge may direct.

§ 16-3-750. Polygraph examination.

A law enforcement officer, prosecuting officer, or other government official may request that the victim of an alleged criminal sexual conduct offense as defined under federal or South Carolina law submit to a polygraph examination or other truth telling device as part of the investigation, charging, or prosecution of the offense if the credibility of the victim is at issue; however, the official must not require the victim to submit to a polygraph examination or other truth telling device as a condition for proceeding with the investigation, charging, or prosecution of the offense.

§ 16-3-1350. Medicolegal examinations for victims of criminal sexual conduct or child sex abuse.

- (A) The State must ensure that a victim of criminal sexual conduct in any degree, criminal sexual conduct with a minor in any degree, or child sexual abuse must not bear the cost of his or her routine medicolegal exam following the assault.
- (B) These exams must be standardized relevant to medical treatment and to gathering evidence from the body of the victim and must be based on and meet minimum standards for rape exam protocol as developed by the South Carolina Law Enforcement Division, the South Carolina Hospital Association, and the Governor's Office Division of Victim Assistance with production costs to be paid from funds appropriated for the Victim's Compensation Fund. These exams must include treatment for sexually transmitted diseases, and must include medication for pregnancy prevention if indicated and if desired. The South Carolina Law Enforcement Division must distribute these exam kits to any licensed health care facility providing sexual assault exams. When dealing with a victim of criminal sexual assault, the law enforcement agency immediately must transport the victim to the nearest licensed health care facility which performs sexual assault exams. A health care facility providing sexual assault exams must use the standardized protocol described in this subsection.
- (C) A licensed health care facility, upon completion of a routine sexual assault exam as described in subsection (B) performed on a victim of criminal sexual conduct in any degree, criminal sexual conduct with a minor in any degree, or child sexual abuse, may file a claim for reimbursement directly to the South Carolina Crime Victim's Compensation Fund if the offense occurred in South Carolina. The South Carolina Crime Victim's Compensation Fund must develop procedures for health care facilities to follow when filing a claim with respect to the privacy of the victim. Health care facility personnel must obtain information necessary for the claim at the time of the exam, if possible. The South Carolina Crime Victim's Compensation Fund must reimburse eligible health care facilities directly.
- (D) The Governor's Office Division of Victim Assistance must utilize existing funds appropriated from the general fund for the purpose of compensating licensed health care facilities for the cost of routine medical exams for sexual assault victims as described above. When the director determines that projected reimbursements in a fiscal year provided in this section exceed funds appropriated for payment of these reimbursements, he must direct the payment of the additional services from the Victim's Compensation Fund.

For the purpose of this particular exam, the one hundred dollar deductible is waived for award eligibility under the fund. The South Carolina Victim's Compensation Fund must develop appropriate guidelines and procedures and distribute them to law enforcement agencies and appropriate health care facilities.

§ 16-3-1550. Crime victims bill of rights.

- (A) Employers of victims and witnesses must not retaliate against or suspend or reduce the wages and benefits of a victim or witness who lawfully responds to a subpoena. A wilful violation of this provision constitutes contempt of court.
- (B) A person must not be sequestered from a proceeding adjudicating an offense of which he was a victim.
- (C) For proceedings in the circuit or family court, the law enforcement and prosecuting agency must make reasonable efforts to provide victims and prosecution witnesses waiting areas separate from those used by the defendant and defense witnesses.
- (D) The circuit or family court judge must recognize and protect the rights of victims and witnesses as diligently as those of the defendant. A circuit or family court judge, before proceeding with a trial, plea, sentencing, or other dispositive hearing in a case involving a victim, must ask the prosecuting agency to verify that a reasonable attempt was made to notify the victim sufficiently in advance to attend. If notice was not given in a timely manner, the hearing must be delayed for a reasonable time to allow notice.
- (E) The circuit or family court must treat sensitively witnesses who are very young, elderly, handicapped, or who have special needs by using closed or taped sessions when appropriate. The prosecuting agency or defense attorney must notify the court when a victim or witness deserves special consideration.
- (F) The circuit or family court must hear or review any victim impact statement, whether written or oral, before sentencing. Within a reasonable period of time before sentencing, the prosecuting agency must make available to the defense any written victim impact statement and the court must allow the defense an opportunity to respond to the statement. However, the victim impact statement must not be provided to the defense until the defendant has been found guilty by a judge or jury. The victim impact statement and its contents are not admissible as evidence in any trial.
- (G) The circuit and family court must address the issue of restitution as provided by statute.

§ 17-23-175. Admissibility of out-of-court statement of child under twelve; determination of trustworthiness; notice to adverse party.

(A) In a general sessions court proceeding or a delinquency proceeding in family court, an out-of-court statement of a child is admissible if:

- (1) the statement was given in response to questioning conducted during an investigative interview of the child;
- (2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means, except as provided in subsection (F);
- (3) the child testifies at the proceeding and is subject to cross-examination on the elements of the offense and the making of the out-of-court statement; and
- (4) the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.

(B) In determining whether a statement possesses particularized guarantees of trustworthiness, the court may consider, but is not limited to, the following factors:

- (1) whether the statement was elicited by leading questions;
- (2) whether the interviewer has been trained in conducting investigative interviews of children;
- (3) whether the statement represents a detailed account of the alleged offense;
- (4) whether the statement has internal coherence; and
- (5) sworn testimony of any participant which may be determined as necessary by the court.

(C) For purposes of this section, a child is:

- (1) a person who is under the age of twelve years at the time of the making of the statement or who functions cognitively, adaptively, or developmentally under the age of twelve at the time of making the statement; and
- (2) a person who is the alleged victim of, or witness to, a criminal act for which the defendant, upon conviction, would be required to register pursuant to the provisions of Article 7, Chapter 3, Title 23.

(D) For purposes of this section an investigative interview is the questioning of a child by a law enforcement officer, a Department of Social Services case worker, or other professional interviewing the child on behalf of one of these agencies, or in response to a suspected case of child abuse.

(E)(1) The contents of a statement offered pursuant to this section are subject to discovery pursuant to Rule 5 of the South Carolina Rules of Criminal Procedure.

(2) If the child is twelve years of age or older, an adverse party may challenge the finding that the child functions cognitively, adaptively, or developmentally under the age of twelve.

(F) Out-of-court statements made by a child in response to questioning during an investigative interview that is visually and auditorily recorded will always be given preference. If, however, an electronically unrecorded statement is made to a professional in his professional capacity by a child victim or witness regarding an act of sexual assault or physical abuse, the court may consider the statement in a hearing outside the presence of the jury to determine:

(1) the necessary visual and audio recording equipment was unavailable;

(2) the circumstances surrounding the making of the statement;

(3) the relationship of the professional and the child; and

(4) if the statement possesses particularized guarantees of trustworthiness.

After considering these factors and additional factors the court deems important, the court will make a determination as to whether the statement is admissible pursuant to the provisions of this section.

§ 19-11-30. Competency of husband or wife of party as witness.

In any trial or inquiry in any suit, action, or proceeding in any court or before any person having, by law or consent of the parties, authority to examine witnesses or hear evidence, no husband or wife may be required to disclose any confidential or, in a criminal proceeding, any communication made by one to the other during their marriage.

Notwithstanding the above provisions, a husband or wife is required to disclose any communication, confidential or otherwise, made by one to the other during their marriage where the suit, action, or proceeding concerns or is based on child abuse or neglect, the death of a child, criminal sexual conduct involving a minor, or the commission or attempt to commit a lewd act upon a minor.

Miscellaneous Child Protection Statutes

Coordination of Investigations

§ 63-11-310. Children's Advocacy Centers

(A) 'Children's Advocacy Centers' mean centers which must coordinate a multiagency response to child maltreatment and assist in the investigation and assessment of child abuse. These centers must provide: (1) a neutral, child-friendly facility for forensic interviews; (2) the coordination of services for children reported to have been abused; (3) services including, but not limited to, forensic interviews, forensic medical examinations, and case reviews by

multidisciplinary teams to best determine whether maltreatment has occurred; and (4) therapeutic counseling services, support services for the child and nonoffending family members, court advocacy, consultation, and training for professionals who work in the area of child abuse and neglect, to reduce negative impact to the child and break the cycle of abuse.

- (B)(1) Children's Advocacy Centers must establish memoranda of agreement with governmental entities charged with the investigation and prosecution of child abuse. Fully operational centers must function in a manner consistent with standards of the National Children's Alliance, and all centers must strive to achieve full membership in the National Children's Alliance.
- (2) Children's Advocacy Centers must establish written policies and procedures for standards of care including, but not limited to, the timely intervention of services between initial contact with the child and the event which led to the child's being referred to the center. Children's Advocacy Centers must make available these written policies and procedures to all professionals who provide services relating to the investigation, treatment, and prosecution of child abuse and neglect within the geographical vicinity of the center.
- (3) Children's Advocacy Center records must be released to the Department of Social Services for purposes of investigation, assessment of allegations of child abuse or neglect, and provision of treatment services to the children or their families. The records must be released to law enforcement agencies and circuit solicitors or their agents who are: (a) investigating or prosecuting known or suspected abuse or neglect of a child; (b) investigating or prosecuting the death of a child; (c) investigating or prosecuting any crime against a child; or (d) attempting to locate a missing child.

This provision does not preclude or override the release of information based upon a subpoena or court order, unless otherwise prohibited by law.

- (C) The South Carolina Network of Children's Advocacy Centers and the South Carolina Chapter of the National Children's Alliance must coordinate and facilitate the exchange of information among statewide centers and provide technical assistance to communities in the establishment, growth, and certification of local centers. The network must also educate the public and legislature regarding the needs of abused children and provide or coordinate multidisciplinary training opportunities which support the comprehensive response to suspected child maltreatment.

(D) Nothing in this section requires the exclusive use of a Children's Advocacy Center.

§ 63-7-920(C). Number and place of interviews.

(E) The department or law enforcement, or both, may interview the child alleged to have been abused or neglected and any other child in the household during the investigation. The interviews may be conducted on school premises, at childcare facilities, at the child's home or at other suitable locations and in the discretion of the department or law enforcement, or both, may be conducted outside the presence of the parents. To the extent reasonably possible, the needs and interests of the child must be accommodated in making arrangements for interviews, including time, place, method of obtaining the child's presence, and conduct of the interview. The department or law enforcement, or both, shall provide notification of the interview to the parents as soon as reasonably possible during the investigation if notice will not jeopardize the safety of the child or the course of the investigation. All state, law enforcement, and community agencies providing child welfare intervention into a child's life should coordinate their services to minimize the number of interviews of the child to reduce potential emotional trauma to the child.

§ 63-7-980. Cooperation between law enforcement and DSS.

(A) The department must cooperate with law enforcement agencies within the area it serves and establish procedures necessary to facilitate the referral of child protection cases to the department.

(B)(1)Where the facts indicating abuse or neglect also appear to indicate a violation of criminal law, the department must notify the appropriate law enforcement agency of those facts within twenty-four hours of the department's finding for the purposes of police investigation. The law enforcement agency must file a formal incident report at the time it is notified by the department of the finding.

(2)When the intake report is of alleged sexual abuse, the department must notify the appropriate law enforcement agency within twenty-four hours of receipt of the report to determine if a joint investigation is necessary. The law enforcement agency must file a formal incident report at the time it is notified of the alleged sexual abuse.

(C)The law enforcement agency must provide to the department copies of incident reports generated in any case reported to law enforcement by the department and in any case in which the officer responsible for the case knows the department is involved with the family

or the child. The law enforcement officer must make reasonable efforts to advise the department of significant developments in the case, such as disposition in summary court, referral of a juvenile to the Department of Juvenile Justice, arrest or detention, trial date, and disposition of charges.

- (D) The department must include in its records copies of incident reports provided under this section and must record the disposition of charges.

§ 63-7-760. Protocols.

The department and local law enforcement agencies shall develop written protocols to address issues related to emergency protective custody. The protocols shall cover at a minimum information exchange between the department and local law enforcement agencies, consultation on decisions to assume legal custody, and the transfer of responsibility over the child, including mechanisms and assurances for the department to arrange expeditious placement of the child.

General Child Protection Statutes

§ 19-1-180. Out-of-court statements by certain children.

- (A) An out-of-court statement made by a child who is under twelve years of age or who functions cognitively, adaptively, or developmentally under the age of twelve at the time of a family court proceeding brought pursuant to Title 20 concerning an act of alleged abuse or neglect as defined by Section 20-7-490 is admissible in the family court proceeding if the requirements of this section are met regardless of whether the statement would be otherwise inadmissible.
- (B) An out-of-court statement may be admitted as provided in subsection (A) if:
- (1) the child testifies at the proceeding or testifies by means of videotaped deposition or closed-circuit television, and at the time of the testimony the child is subject to cross-examination about the statement; or
 - (2) (a) the child is found by the court to be unavailable to testify on any of these grounds:
 - (i) the child's death; (ii) the child's physical or mental disability; (iii) the existence of a privilege involving the child; (iv) the child's incompetency, including the child's inability to communicate about the offense because of fear; (v) substantial likelihood that the child would suffer severe emotional trauma from testifying at the proceeding

or by means of videotaped deposition or closed-circuit television; and (b) the child's out-of-court statement is shown to possess particularized guarantees of trustworthiness.

- (C) The proponent of the statement shall inform the adverse party of the proponent's intention to offer the statement and the content of the statement sufficiently in advance of the proceeding to provide the defendant with a fair opportunity to prepare a response to the statement before the proceeding at which it is offered. If the child is twelve years of age or older, the adverse party may challenge the professional decision that the child functions cognitively, adaptively, or developmentally under the age of twelve.
- (D) In determining whether a statement possesses particularized guarantees of trustworthiness under subsection (B)(2)(b), the court may consider, but is not limited to, the following factors:
- (1) the child's personal knowledge of the event;
 - (2) the age and maturity of the child;
 - (3) certainty that the statement was made, including the credibility of the person testifying about the statement;
 - (4) any apparent motive the child may have to falsify or distort the event, including bias, corruption, or coercion;
 - (5) whether more than one person heard the statement;
 - (6) whether the child was suffering pain or distress when making the statement;
 - (7) the nature and duration of any alleged abuse;
 - (8) whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;
 - (9) whether the statement has a ring of verity, has internal consistency or coherence, and uses terminology appropriate to the child's age;
 - (10) whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement.
- (E) The court shall support with findings on the record any rulings pertaining to the child's unavailability and the trustworthiness of the out-of-court statement.

(F) Any hearsay testimony admissible under this section shall not be admissible in any other proceeding.

(G) If the parents of the child are separated or divorced, the hearsay statement shall be inadmissible if (1) one of the parents is the alleged perpetrator of the alleged abuse or neglect and (2) the allegation was made after the parties separated or divorced.

Notwithstanding this subsection, a statement alleging abuse or neglect made by a child to a law enforcement official, an officer of the court, a licensed family counselor or therapist, a physician or other health care provider, a teacher, a school counselor, a Department of Social Services staff member, or to a child care worker in a regulated child care facility is admissible under this section.

§ 63-7-310. Persons required or permitted to report.

(A) A physician, nurse, dentist, optometrist, medical examiner, or coroner, or an employee of a county medical examiner's or coroner's office, or any other medical, emergency medical services, mental health, or allied health professional, member of the clergy including a Christian Science Practitioner or religious healer, school teacher, counselor, principal, assistant principal, school attendance officer, social or public assistance worker, substance abuse treatment staff, or childcare worker in a childcare center or foster care facility, foster parent, police or law enforcement officer, juvenile justice worker, undertaker, funeral home director or employee of a funeral home, persons responsible for processing films, computer technician, judge, or a volunteer non-attorney guardian ad litem serving on behalf of the South Carolina Guardian Ad Litem Program or on behalf of Richland County CASA must report in accordance with this section when in the person's professional capacity the person has received information which gives the person reason to believe that a child has been or may be abused or neglected as defined in Section 63-7-20.

(B) If a person required to report pursuant to subsection (A) has received information in the person's professional capacity which gives the person reason to believe that a child's physical or mental health or welfare has been or may be adversely affected by acts or omissions that would be child abuse or neglect if committed by a parent, guardian, or other person responsible for the child's welfare, but the reporter believes that the act or omission was committed by a person other than the parent, guardian, or other person responsible for the child's welfare, the reporter must make a report to the appropriate law enforcement agency.

- (C) Except as provided in subsection (A), any person, including but not limited to, a volunteer non-attorney guardian ad litem serving on behalf of the South Carolina Guardian Ad Litem Program or on behalf of Richland County CASA, who has reason to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse and neglect may report, and is encouraged to report, in accordance with this section.
- (D) Reports of child abuse or neglect may be made orally by telephone or otherwise to the county department of social services or to a law enforcement agency in the county where the child resides or is found.

§63-7-320. Notification and transfer.

- (A) Where reports are made pursuant to Section 63-7-310 to a law enforcement agency, the law enforcement agency shall notify the county department of social services of the law enforcement's response to the report at the earliest possible time.
- (B) Where a county or contiguous counties have established multicounty child protective services, the county department of social services immediately shall transfer reports pursuant to this section to the service.

§63-7-330. Confidentiality of information.

- (A) The identity of the person making a report pursuant to this section must be kept confidential by the agency or department receiving the report and must not be disclosed except as provided for in subsection (B) or (C) or as otherwise provided for in this chapter.
- (B) When the department refers a report to a law enforcement agency for a criminal investigation, the department must inform the law enforcement agency of the identity of the person who reported the child abuse or neglect. The identity of the reporter must only be used by the law enforcement agency to further the criminal investigation arising from the report, and the agency must not disclose the reporter's identity to any person other than an employee of the agency who is involved in the criminal investigation arising from the report. If the reporter testifies in a criminal proceeding arising from the report, it must not be disclosed that the reporter made the report.
- (C) When a law enforcement agency refers a report to the department for an investigation or other response, the law enforcement agency must inform the department of the identity of the person who reported the child abuse or neglect. The department must not disclose the identity of the reporter to any person except as authorized by Section 63-7-1990.

§63-7-340. Previous reports.

When a report is referred to the department for an investigation or other response, the department must determine whether previous reports have been made regarding the same child or the same subject of the report. In determining whether previous reports have been made, the department must determine whether there are any suspected, indicated, or unfounded reports maintained pursuant to Section 63-7-930 regarding the same child or the same subject of the report.

§63-7-350. Reports for lack of investigation.

If the department does not conduct an investigation as a result of information received pursuant to this subarticle, the department must make a record of the information and must classify the record as a Category IV unfounded report in accordance with Section 63-7-930. The department and law enforcement are authorized to use information recorded pursuant to this subsection for purposes of assessing risk and safety if additional contacts are made concerning the child, the family, or the subject of the report.

§ 63-7-620. Emergency protective custody.

- (A) A law enforcement officer may take emergency protective custody of a child without the consent of the child's parents, guardians, or others exercising temporary or permanent control over the child if:
- (1) the officer has probable cause to believe that by reason of abuse or neglect the child's life, health, or physical safety is in substantial and imminent danger if the child is not taken into emergency protective custody, and there is not time to apply for a court order pursuant to Section 63-7-1660. When a child is taken into emergency protective custody following an incident of excessive corporal punishment, and the only injury to the child is external lesions or minor bruises, other children in the home shall not be taken into emergency protective custody solely on account of the injury of one child through excessive corporal punishment. However, the officer may take emergency protective custody of other children in the home if a threat of harm to them is further indicated by factors including, but not limited to, a prior history of domestic violence or other abuse in the home, alcohol or drug abuse if known or evident at the time of the initial contact, or other circumstances indicative of danger to the children;
 - (2) the child's parent, parents, or guardian has been arrested or the child has become lost accidentally and as a result the child's welfare is threatened due to loss of adult protection and supervision; and (a) in the circumstances of arrest, the parent, parents, or guardian does not consent in writing to another person assuming physical custody of the child; (b) in the circumstances of a lost child, a search by law enforcement has not located the parent, parents, or guardian.
- (B)(1) If the child is in need of emergency medical care at the time the child is taken into emergency protective custody, the officer shall transport the child to an appropriate health care facility. Emergency medical care may be provided to the child without consent, as provided in Section 63-5-350. The parent or guardian is responsible for the cost of emergency medical care that is provided to the child. However, the parent or guardian is not

responsible for the cost of medical examinations performed at the request of law enforcement or the department solely for the purpose of assessing whether the child has been abused or neglected unless it is determined that the child has been harmed as defined in this article.

(2) If the child is not in need of emergency medical care, the officer or the department shall transport the child to a place agreed upon by the department and law enforcement, and the department within two hours shall assume physical control of the child and shall place the child in a licensed foster home or shelter within a reasonable period of time. In no case may the child be placed in a jail or other secure facility or a facility for the detention of criminal or juvenile offenders. While the child is in its custody, the department shall provide for the needs of the child and assure that a child of school age who is physically able to do so continues attending school.

§63-7-630. Notification of DSS.

When an officer takes a child into emergency protective custody under this subarticle, the officer immediately shall notify the department. The department shall notify the parent, guardian, or other person exercising temporary or permanent control over the child as early as reasonably possible of the location of the child unless there are compelling reasons for believing that disclosure of this information would be contrary to the best interests of the child.

§63-7-640. Preliminary investigation.

The department shall conduct within twenty-four hours after the child is taken into emergency protective custody by law enforcement or pursuant to ex parte order a preliminary investigation to determine whether grounds for assuming legal custody of the child exist and whether reasonable means exist for avoiding removal of the child from the home of the parent or guardian or for placement of the child with a relative and means for minimizing the emotional impact on the child of separation from the child's home and family. During this time the department, if possible, shall convene, a meeting with the child's parents or guardian, extended family, and other relevant persons to discuss the family's problems that led to intervention and possible corrective actions, including placement of the child.

§63-7-650. Risk assessment before placement.

Before agreeing to or acquiescing in a corrective action that involves placement of the child with a relative or other person or making an interim placement with a relative while retaining custody of the child or as soon as possible after agreeing to or acquiescing in a corrective action, the department shall secure from the relative or other person and other adults in the home an affidavit attesting to information necessary to determine whether a criminal history or history of child abuse or neglect exists and whether this history indicates there is a significant risk that the child would be threatened with abuse or neglect in the home of the relative or other person. As soon as possible, the department shall confirm the information supplied in the affidavit by checking the Central Registry of Child Abuse and Neglect, other relevant department records, county sex offender registries, and records for the preceding five years of law enforcement agencies in the jurisdiction in which the relative or other person resides and, to the extent reasonably possible, jurisdictions in which the relative or other person has resided during that period. The department must not agree to or acquiesce in a placement if the affidavit or these records reveal information indicating there is a significant risk that the child would be threatened with abuse or neglect in the home of the relative or other person. The relative or other person must consent to a check of the above records by the department.

§63-7-660. Assumption of legal custody.

If the department determines after the preliminary investigation that there is probable cause to believe that by reason of abuse or neglect the child's life, health, or physical safety is in imminent and substantial danger, the department may assume legal custody of the child without the consent of the child's parent, guardian, or custodian. The department shall make every reasonable effort to notify the child's parent, guardian, or custodian of the location of the child and shall make arrangements for temporary visitation unless there are compelling reasons why visitation or notice of the location of the child would be contrary to the best interests of the child. The notification must be in writing and shall include notice of the right to a hearing and right to counsel pursuant to this article. Nothing in this subsection authorizes the department to physically remove a child from the care of the child's parent or guardian without an order of the court. The department may exercise the authority to assume legal custody only after a law enforcement officer has taken emergency protective custody of the child or the family court has granted emergency protective custody by ex parte order, and the department has conducted a preliminary investigation pursuant to Section 63-7-640.

§63-7-670. Returning child to parents; alternative procedures.

If emergency protective custody of the child was taken by a law enforcement officer pursuant to subsection (A), and the department concludes after the preliminary investigation that the child should be returned to the child's parent, guardian, or custodian, the department shall consult with the law enforcement officer who took emergency protective custody unless the department and the law enforcement agency have agreed to an alternative procedure. If the officer objects to the return of the child, the department must assume legal custody of the child until a probable cause hearing can be held. The alternative procedure agreed to by the department and the law enforcement agency may provide that the child must be retained in custody if the officer cannot be contacted, conditions under which the child may be returned home if the officer cannot be contacted, other persons within the law enforcement agency who are to be consulted instead of the officer, or other procedures. If no alternative procedure has been agreed to and the department is unable to contact the law enforcement officer after reasonable efforts to do so, the department shall consult with the officer's designee or the officer's agency.

§63-7-680. Emergency protective custody extensions.

The period of emergency protective custody may be extended for up to twenty-four additional hours if:

- (1) the department concludes that the child is to be placed with a relative or other person instead of taking legal custody of the child;
- (2) the department requests the appropriate law enforcement agency to check for records concerning the relative or other person, or any adults in that person's home; and
- (3) the law enforcement agency notifies the department that the extension is needed to enable the law enforcement agency to complete its record check before the department's decision on whether to take legal custody of the child.

§63-7-690. Relative placement.

(A) If within the twenty-four hours following removal of the child:

- (1) the department has identified a specified relative or other person with whom it has determined that the child is to be placed instead of the department's taking legal custody of the child; and

- (2) both the relative or other person with whom the child is to be placed and the child's parent or guardian have agreed to the placement, the department may retain physical custody of the child for no more than five additional days if necessary to enable the relative or other person to make travel or other arrangements incident to the placement.
- (B) A probable cause hearing pursuant to Section 63-7-710 shall not be held unless the placement fails to occur as planned within the five-day period or the child's parent or guardian makes a written request for a hearing to the department. The department must give the child's parent or guardian written notice of the right to request a probable cause hearing to obtain a judicial determination of whether removal of the child from the home was and remains necessary. Upon receipt of a written request for a hearing from the child's parent or guardian, the department shall schedule a hearing for the next date on which the family court is scheduled to hear probable cause hearings.
- (C) If the placement does not occur as planned within the five-day period, the department immediately must determine whether to assume legal custody of the child and file a petition as provided in Section 63-7-700(B). The department shall assure that the child is given age-appropriate information about the plans for placement and any subsequent changes in those plans at the earliest feasible time.

§63-7-700. Emergency protective custody proceedings.

- (A) If a law enforcement officer clearly states to the department at the time the officer delivers physical control of the child to the department that the child is not to be returned to the home or placed with a relative before a probable cause hearing regardless of the outcome of a preliminary investigation, the department immediately must take legal custody of the child. In this case, at a minimum, the department shall conduct a preliminary investigation as provided in Section 63-7-640 within seventy-two hours after the child was taken into emergency protective custody and shall make recommendations concerning return of the child to the home or placement with a relative or other person to the family court at the probable cause hearing or take other appropriate action as provided in this chapter.
- (B)(1) The department, upon assuming legal custody of the child, shall begin a child protective investigation, including immediate attention to the protection of other children in the home, or other setting where the child was found. The department shall initiate a removal proceeding in the appropriate family court pursuant to Section 63-7-1660 on or before the next working day after initiating the investigation. If a noncustodial parent is not named as a party, the department shall exercise every reasonable effort to promptly notify the

noncustodial parent that a removal proceeding has been initiated and of the date and time of any hearings scheduled pursuant to this section.

- (2) Upon a determination by the department before the probable cause hearing that there is not a preponderance of evidence that child abuse or neglect occurred, the department may place physical custody of the child with the parent, parents, guardian, immediate family member, or relative, with the department retaining legal custody pending the probable cause hearing.
- (3) When the facts and circumstances of the report clearly indicate that no abuse or neglect occurred, the report promptly must be determined to be unfounded, and the department shall exercise reasonable efforts to expedite the placement of the child with the parent, parents, guardian, immediate family member, or relative.
- (C) If the child is returned to the child's parent, guardian, or custodian following the preliminary investigation, a probable cause hearing must be held if requested by the child's parent, guardian, or custodian or the department or the law enforcement agency that took emergency protective custody of the child. The request must be made in writing to the court within ten days after the child is returned. A probable cause hearing pursuant to Section 63-7-710 must be scheduled within seven days of the request to determine whether there was probable cause to take emergency physical custody of the child.

§63-7-710. Probable cause hearing.

- (A) The family court shall schedule a probable cause hearing to be held within seventy-two hours of the time the child was taken into emergency protective custody. If the third day falls upon a Saturday, Sunday, or holiday, the probable cause hearing must be held no later than the next working day. If there is no term of court in the county when the probable cause hearing must be held, the hearing must be held in another county in the circuit. If there is no term of family court in another county in the circuit, the probable cause hearing may be heard in another court in an adjoining circuit.
- (B) The probable cause hearing may be conducted by video conference at the discretion of the judge.
- (C) At the probable cause hearing, the family court shall undertake to fulfill the requirements of Section 63-7-1620 and shall determine whether there was probable cause for taking emergency protective custody and for the department to assume legal custody of the child and shall determine whether probable cause to retain legal custody of the child remains at the time of the hearing.

- (D) At the probable cause hearing, the respondents may submit affidavits as to facts which are alleged to form the basis of the removal and to cross-examine the department's witnesses as to whether there existed probable cause to effect emergency removal.
- (E) The hearing on the merits to determine whether removal of custody is needed, pursuant to Section 63-7-1660, must be held within thirty-five days of the date of receipt of the removal petition. At the probable cause hearing, the court shall set the time and date for the hearing on the merits. A party may request a continuance that would result in the hearing being held more than thirty-five days after the petition was filed, and the court may grant the request for continuance only if exceptional circumstances exist. If a continuance is granted, the hearing on the merits must be completed within sixty-five days following receipt of the removal petition. The court may continue the hearing on the merits beyond sixty-five days without returning the child to the home only if the court issues a written order with findings of fact supporting a determination that the following conditions are satisfied, regardless of whether the parties have agreed to a continuance:
- (1) the court finds that the child should remain in the custody of the department because there is probable cause to believe that returning the child to the home would seriously endanger the child's physical safety or emotional well-being;
 - (2) the court schedules the case for trial on a date and time certain which is not more than thirty days after the date the hearing was scheduled to be held; and
 - (3) the court finds that exceptional circumstances support the continuance or the parties and the guardian ad litem agree to a continuance.
- (F) The court may continue the case past the date and time certain set forth in subsection (E) only if the court issues a new order as required in subsection (E).
- (G) The court may continue the case because a witness is unavailable only if the court enters a finding of fact that the court cannot decide the case without the testimony of the witness. The court shall consider and rule on whether the hearing can begin and then recess to have the witness' testimony taken at a later date or by deposition. The court shall rule on whether the party offering the witness has exercised due diligence to secure the presence of the witness or to preserve the witness' testimony.
- (H) This subsection does not prevent the court from conducting a pendente lite hearing on motion of any party and issuing an order granting other appropriate relief pending a hearing on the merits.

- (I) If the child is returned to the home pending the merits hearing, the court may impose such terms and conditions as it determines appropriate to protect the child from harm, including measures to protect the child as a witness.
- (J) When a continuance is granted pursuant to this subsection, the family court shall ensure that the hearing is rescheduled within the time limits provided herein and give the hearing priority over other matters pending before the court except a probable cause hearing held pursuant to this subsection, a detention hearing held pursuant to Section 63-19-830, or a hearing held pursuant to Section 63-19-1030 or 63-19-1210 concerning a child who is in state custody pursuant to Chapter 19. An exception also may be made for child custody hearings if the court, in its discretion, makes a written finding stating compelling reasons, relating to the welfare of the child, for giving priority to the custody hearing.

§63-7-720. Reasonable efforts to prevent removal.

- (A) An order issued as a result of the probable cause hearing held pursuant to Section 63-7-710 concerning a child of whom the department has assumed legal custody shall contain a finding by the court of whether reasonable efforts were made by the department to prevent removal of the child and a finding of whether continuation of the child in the home would be contrary to the welfare of the child. The order shall state:
 - (1) the services made available to the family before the department assumed legal custody of he child and how they related to the needs of the family;
 - (2) the efforts of the department to provide services to the family before assuming legal custody of the child;
 - (3) why the efforts to provide services did not eliminate the need for the department to assume legal custody;
 - (4) whether a meeting was convened as provided in Section 63-7-640, the persons present, and the outcome of the meeting or, if no meeting was held, the reason for not holding a meeting;
 - (5) what efforts were made to place the child with a relative known to the child or in another familiar environment;
 - (6) whether the efforts to eliminate the need for the department to assume legal custody were reasonable including, but not limited to, whether services were reasonably available and timely, reasonably adequate to address the needs of the family,

reasonably adequate to protect the child and realistic under the circumstances, and whether efforts to place the child in a familiar environment were reasonable.

- (B) If the court finds that reasonable services would not have allowed the child to remain safely in the home, the court shall find that removal of the child without services or without further services was reasonable.

§63-7-730. Expedited relative placement.

If the court orders the child to remain in the legal custody of the department at the probable cause hearing, the family court may order expedited placement of the child with a relative of the first or second degree. The court shall require the department to check the names of all adults in the home against the Central Registry of Child Abuse and Neglect, other relevant records of the department, county sex abuse registers, and records for the preceding five years of law enforcement agencies in the jurisdiction in which the person resides and, to the extent reasonably possible, jurisdictions in which the person has resided during that period. The court may hold open the record of the probable cause hearing for twenty-four hours to receive the reports and based on these reports and other information introduced at the probable cause hearing, the court may order expedited placement of the child in the home of the relative. Nothing in this subsection precludes the department from requesting or the court from ordering pursuant to the department's request either a full study of the relative's home before placement or the licensing or approval of the relative's home before placement.

§63-7-740. Ex parte emergency protective custody.

- (A) The family court may order ex parte that a child be taken into emergency protective custody without the consent of parents, guardians, or others exercising temporary or permanent control over the child if:

(1) the family court judge determines there is probable cause to believe that by reason of abuse or neglect there exists an imminent and substantial danger to the child's life, health, or physical safety; and

(2) parents, guardians, or others exercising temporary or permanent control over the child are unavailable or do not consent to the child's removal from their custody.

- (B) If the court issues such an order, the department shall conduct a preliminary investigation and otherwise proceed as provided in this section.

§63-7-760. Protocols.

The department and local law enforcement agencies shall develop written protocols to address issues related to emergency protective custody. The protocols shall cover at a minimum information exchange between the department and local law enforcement agencies, consultation on decisions to assume legal custody, and the transfer of responsibility over the child, including mechanisms and assurances for the department to arrange expeditious placement of the child.

§ 63-7-610. Statewide jurisdiction.

(A) A law enforcement officer investigating a case of suspected child abuse or neglect or responding to a request for assistance by the department as it investigates a case of suspected child abuse or neglect has authority to take emergency protective custody of the child pursuant to this subarticle in all counties and municipalities.

(B) Immediately upon taking emergency protective custody, the law enforcement officer shall notify the local office of the department responsible to the county in which the activity under investigation occurred.

(C) The department shall designate by policy and procedure the local department office responsible for procedures required by this subarticle when a child resides in a county other than the one in which the activity under investigation occurred. The probable cause hearing required by Section 63-7-710 may be held in the county of the child's residence or the county of the law enforcement officer's jurisdiction.

§ 63-7-990. Access to sex offender registry.

Notwithstanding any other provision of law, upon request of the department, a criminal justice agency having custody of or access to state or local law enforcement records or county sex offender registries shall provide the department with information pertaining to the criminal history of an adult residing in the home of a child who is named in a report of suspected child abuse or neglect or in a home in which it is proposed that the child be placed. This information shall include conviction data, nonconviction data, arrests, and incident reports accessible to the agency. The department shall not be charged a fee for this service.

§ 63-7-750. Doctor or hospital may detain child; civil immunity.

(A) A physician or hospital to which a child has been brought for treatment may detain the child for up to twenty-four hours without the consent of the person responsible for the child's welfare if the physician or hospital:

(1) has reason to believe that the child has been abused or neglected;

(2) has made a report to a law enforcement agency and the department pursuant to Section 63-7-310, stating the time the physician notified the agency or department that the child was being detained until a law enforcement officer could arrive to determine whether the officer should take emergency physical custody of the child pursuant to subarticle 3; and

(3) has reason to believe that release of the child to the child's parent, guardian, custodian, or caretaker presents an imminent danger to the child's life, health, or physical safety. A hospital must designate a qualified person or persons within the hospital who shall have sole authority to detain a child on behalf of the hospital.

(B) A physician or hospital that detains a child in good faith as provided in this section is immune from civil or criminal liability for detaining the child.

§ 63-7-950. Withholding of health care.

(A) Upon receipt of a report that a parent or other person responsible for the welfare of a child will not consent to health care needed by the child, the department shall investigate pursuant to Section 63-7-920. Upon a determination by a preponderance of evidence that adequate health care was withheld for religious reasons or other reasons reflecting an exercise of judgment by the parent or guardian as to the best interest of the child, the department may enter a finding that the child is in need of medical care and that the parent or other person responsible does not consent to medical care for religious reasons or other reasons reflecting an exercise of judgment as to the best interests of the child. The department may not enter a finding by a preponderance of evidence that the parent or other person responsible for the child has abused or neglected the child because of the withholding of medical treatment for religious reasons or for other reasons reflecting an exercise of judgment as to the best interests of the child. However, the department may petition the family court for an order finding that medical care is necessary to prevent death or permanent harm to the child. Upon a determination that a preponderance of evidence shows that the child might die or suffer permanent harm, the court may issue its order authorizing medical treatment without the consent of the parent or other person responsible for the welfare of the child. The

department may move for emergency relief pursuant to family court rules when necessary for the health of the child.

- (B) Proceedings brought under this section must be considered child abuse and neglect proceedings only for purposes of appointment of representation pursuant to Section 63-7-1620.
- (C) This section does not authorize intervention if the child is under the care of a physician licensed under Chapter 47, Title 40, who supports the decision of the parent or guardian as a matter of reasonable medical judgment.

§ 63-7-1990. Confidentiality and release of records and information.

- (A) All reports made and information collected pursuant to this article maintained by the Department of Social Services and the Central Registry of Child Abuse and Neglect are confidential. A person who disseminates or permits the dissemination of these records and the information contained in these records except as authorized in this section, is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand five hundred dollars or imprisoned not more than one year, or both.
- (B) The department is authorized to grant access to the records of indicated cases to the following persons, agencies, or entities:
 - (1) the ombudsman of the office of the Governor or the Governor's designee;
 - (2) a person appointed as the child's guardian ad litem, the attorney for the child's guardian ad litem, or the child's attorney;
 - (3) appropriate staff of the department;
 - (4) a law enforcement agency investigating or prosecuting known or suspected abuse or neglect of a child or any other crime against a child, attempting to locate a missing child, investigating or prosecuting the death of a child, or investigating or prosecuting any other crime established in or associated with activities authorized under this article;
 - (5) a person who is named in a report or investigation pursuant to this article as having abused or neglected a child, that person's attorney, and that person's guardian ad litem;
 - (6) a child fourteen years of age or older who is named in a report as a victim of child abuse or neglect, except in regard to information that the department may determine to be detrimental to the emotional well-being of the child;

- (7) the parents or guardians of a child who is named in a report as a victim of child abuse or neglect;
- (8) county medical examiners or coroners who are investigating the death of a child;
- (9) the State Child Fatality Advisory Committee and the Department of Child Fatalities in accordance with the exercise of their purposes or duties pursuant to Article 19, Chapter 11;
- (10) family courts conducting proceedings pursuant to this article;
- (11) the parties to a court proceeding in which information in the records is legally relevant and necessary for the determination of an issue before the court, if before the disclosure the judge has reviewed the records in camera, has determined the relevancy and necessity of the disclosure, and has limited disclosure to legally relevant information under a protective order;
- (12) a grand jury by subpoena upon its determination that access to the record is necessary in the conduct of its official business;
- (13) authorities in other states conducting child abuse and neglect investigations or providing child welfare services;
- (14) courts in other states conducting child abuse and neglect proceedings or child custody proceedings;
- (15) the director or chief executive officer of a childcare facility, child placing agency, or child caring facility when the records concern the investigation of an incident of child abuse or neglect that allegedly was perpetrated by an employee or volunteer of the facility or agency against a child served by the facility or agency;
- (16) a person or agency with authorization to care for, diagnose, supervise, or treat the child, the child's family, or the person alleged to have abused or neglected the child;
- (17) any person engaged in bona fide research with the written permission of the state director or the director's designee, subject to limitations the state director may impose;
- (18) multidisciplinary teams impaneled by the department or impaneled pursuant to statute;
- (19) circuit solicitors and their agents investigating or prosecuting known or suspected abuse or neglect of a child or any other crime against a child, attempting to locate a missing child, investigating or prosecuting the death of a child, or investigating or

prosecuting any other crime established in or associated with activities authorized under this article;

- (20) prospective adoptive or foster parents before placement;
 - (21) the Division for the Review of the Foster Care of Children, Office of the Governor, for purposes of certifying in accordance with Section 63-11-730 that no potential employee or no nominee to and no member of the state or a local foster care review board is a subject of an indicated report or affirmative determination.
 - (22) employees of the Division for the Review of the Foster Care of Children, Office of the Governor and members of local boards when carrying out their duties pursuant to Article 7 of Chapter 11; the department and the division shall limit by written agreement or regulation, or both, the documents and information to be furnished to the local boards.
 - (23) The Division of Guardian ad Litem, Office of the Governor, for purposes of certifying that no potential employee or volunteer is the subject of an indicated report or an affirmative determination.
- (C) The department may limit the information disclosed to individuals and entities named in subsection (B) (13), (14), (15), (16), (17), (18), and (20) to that information necessary to accomplish the purposes for which it is requested or for which it is being disclosed. Nothing in this subsection gives to these entities or persons the right to review or copy the complete case record.
- (D) When a request for access to the record comes from an individual identified in subsection (B)(5), (6), or (7) or that person's attorney, the department shall review any reports from medical care providers and mental health care providers to determine whether the report contains information that does not pertain to the case decision, to the treatment needs of the family as a whole, or to the care of the child. If the department determines that these conditions exist, before releasing the document, the department shall provide a written notice identifying the report to the requesting party and to the person whose treatment or assessment was the subject of the report. The notice may be mailed to the parties involved or to their attorneys or it may be delivered in person. The notice shall state that the department will release the report after ten days from the date notice was mailed to all parties and that any party objecting to release may apply to the court of competent jurisdiction for relief. When a medical or mental health provider or agency furnishes copies of reports or records to the department and designates in writing that those reports or

records are not to be further disclosed, the department must not disclose those documents to persons identified in subsection (B)(5), (6), or (7) or that person's attorney. The department shall identify to the requesting party the records or reports withheld pursuant to this subsection and shall advise the requesting party that he may contact the medical or mental health provider or agency about release of the records or reports.

- (E) A disclosure pursuant to this section shall protect the identity of the person who reported the suspected child abuse or neglect. The department also may protect the identity of any other person identified in the record if the department finds that disclosure of the information would be likely to endanger the life or safety of the person. Nothing in this subsection prohibits the department from subpoenaing the reporter or other persons to court for the purpose of testimony if the department determines the individual's testimony is necessary to protect the child; the fact that the reporter made the report must not be disclosed.
- (F) The department is authorized to summarize the outcome of an investigation to the person who reported the suspected child abuse or neglect if the person requests the information at the time the report is made. The department has the discretion to limit the information disclosed to the reporter based on whether the reporter has an ongoing professional or other relationship with the child or the family.
- (G) The state director of the department or the director's designee may disclose to the media information contained in child protective services records if the disclosure is limited to discussion of the department's activities in handling the case including information placed in the public domain by other public officials, a criminal prosecution, the alleged perpetrator or the attorney for the alleged perpetrator, or other public judicial proceedings. For purposes of this subsection, information is considered "placed in the public domain" when it has been reported in the news media, is contained in public records of a criminal justice agency, is contained in public records of a court of law, or has been the subject of testimony in a public judicial proceeding.
- (H) The state director or the director's designee is authorized to prepare and release reports of the results of the department's investigations into the deaths of children in its custody or receiving child welfare services at the time of death.
- (I) The department is authorized to disclose information concerning an individual named in the Central Registry of Child Abuse and Neglect as a perpetrator when screening of an individual's background is required by statute or regulation for employment, licensing, or any other purposes, or a request is made in writing by the person being screened. Nothing in

this section prevents the department from using other information in department records when making decisions concerning licensing, employment, or placement, or performing other duties required by this act. The department also is authorized to consult any department records in providing information to persons conducting preplacement investigations of prospective adoptive parents in accordance with Section 63-9-520.

- (J) The department is authorized to maintain in its childcare regulatory records information about investigations of suspected child abuse or neglect occurring in childcare facilities.
 - (1) The department must enter child abuse or neglect investigation information in its regulatory record from the beginning of the investigation and must add updated information as it becomes available. Information in the regulatory records must include at least the date of the report, the nature of the alleged abuse or neglect, the outcome of the investigation, any corrective action required, and the outcome of the corrective action plan.
 - (2) The department's regulatory records must not contain the identity of the reporter or of the victim child.
 - (3) The identity of the perpetrator must not appear in the record unless the family court has confirmed the department's determination or a criminal prosecution has resulted in conviction of the perpetrator.
 - (4) Nothing in this subsection may be construed to limit the department's authority to use information from investigations of suspected child abuse or neglect occurring in childcare facilities to pursue an action to enjoin operation of a facility as provided in Chapter 13.
 - (5) Record retention provisions applicable to the department's child protective services case records are not applicable to information contained in regulatory records concerning investigations of suspected child abuse or neglect occurring in childcare facilities.
- (K) All reports made available to persons pursuant to this section must indicate whether or not an appeal is pending on the report pursuant to Subarticle 9.
- (L) The department may disclose to participants in a family group conference relevant information concerning the child or family or other relevant information to the extent that the department determines that the disclosure is necessary to accomplish the purpose of the

family group conference. Participants in the family group conference must be instructed to maintain the confidentiality of information disclosed by the agency.

- (M) Nothing in this section may be construed to waive the confidential nature of the case record, to waive any statutory or common law privileges attaching to the department's internal reports or to information in case records, to create a right to access under the Freedom of Information Act, or to require the department to search records or generate reports for the purposes of the Freedom of Information Act.

Department of Child Fatalities

§ 63-11-1940. Purpose and duties of department.

- (A) The purpose of the department is to expeditiously investigate child deaths in all counties of the State.
- (B) To achieve its purpose, the department shall:
 - (1) upon receipt of a report of a child death from the county coroner or medical examiner, as required by Section 17-5-540, investigate and gather all information on the child fatality. The coroner or medical examiner immediately must request an autopsy if SLED determines that an autopsy is necessary. The autopsy must be performed by a pathologist with forensic training as soon as possible. The forensic pathologist must inform the department of the findings within forty-eight hours of completion of the autopsy. If the autopsy reveals the cause of death to be pathological or an unavoidable accident, the case must be closed by the department. If the autopsy reveals physical or sexual trauma, suspicious markings, or other findings that are questionable or yields no conclusion to the cause of death, the department immediately must begin an investigation;
 - (2) request assistance of any other local, county, or state agency to aid in the investigation;
 - (3) upon receipt of additional investigative information, reopen a case for another coroner's inquest;
 - (4) upon receipt of the notification required by item (1), review agency records for information regarding the deceased child or family. Information available to the department pursuant to Section 63-11-1960 and information which is public under Chapter 4, Title 30, the Freedom of Information Act, must be available as needed to the county coroner or medical examiner and county department of social services;

- (5) report the activities and findings related to a child fatality to the State Child Fatality Advisory Committee;
- (6) develop a protocol for child fatality reviews;
- (7) develop a protocol for the collection of data regarding child deaths as related to Section 17-5-540 and provide training to local professionals delivering services to children, county coroners and medical examiners, and law enforcement agencies on the use of the protocol;
- (8) study the operations of local investigations of child fatalities, including the statutes, regulations, policies, and procedures of the agencies involved with children's services and child death investigations;
- (9) examine confidentiality and access to information statutes, regulations, policies, and procedures for agencies with responsibilities for children, including, but not limited to, health, public welfare, education, social services, mental health, alcohol and other substance abuse, and law enforcement agencies and determine whether those statutes, regulations, policies, or procedures impede the exchange of information necessary to protect children from preventable deaths. If the department identifies a statute, regulation, policy, or procedure that impedes the necessary exchange of information, the department shall notify the committee and the agencies serving on the committee and the committee shall include proposals for changes to statutes, regulations, policies, or procedures in the committee's annual report;
- (10) develop a Forensic Pathology Network available to coroners and medical examiners for prompt autopsy findings;
- (11) submit to the Governor and the General Assembly, an annual report and any other reports prepared by the department, including, but not limited to, the department's findings and recommendations;
- (12) promulgate regulations necessary to carry out its purposes and responsibilities under this article.

§ 63-11-1950. Purpose and duties of committee.

- (A) The purpose of the State Child Fatality Advisory Committee is to decrease the incidences of preventable child deaths by:
 - (1) developing an understanding of the causes and incidences of child deaths;

(2) developing plans for and implementing changes within the agencies represented on the committee which will prevent child deaths; and

(3) advising the Governor and the General Assembly on statutory, policy, and practice changes which will prevent child deaths.

(B) To achieve its purpose, the committee shall:

(1) meet with the department no later than one month after the department receives notification by the county coroner or medical examiner pursuant to Section 17-5-540 to review the investigation of the death;

(2) undertake annual statistical studies of the incidences and causes of child fatalities in this State. The studies shall include an analysis of community and public and private agency involvement with the decedents and their families before and subsequent to the deaths;

(3) the committee shall consider training, including cross-agency training, consultation, technical assistance needs, and service gaps. If the committee determines that changes to any statute, regulation, policy, or procedure is needed to decrease the incidence of preventable child deaths, the committee shall include proposals for changes to statutes, regulations, policies, and procedures in the committee's annual report;

(4) educate the public regarding the incidences and causes of child deaths, the public role in preventing these deaths, and specific steps the public can undertake to prevent child deaths. The committee shall enlist the support of civic, philanthropic, and public service organizations in performing the committee's education duties;

(5) develop and implement policies and procedures for its own governance and operation;

(6) submit to the Governor and General Assembly, an annual written report and any other reports prepared by the committee, including, but not limited to, the committee's findings and recommendations. Annual reports must be made available to the public.

§ 63-11-1960. Access to information.

Upon request of the department and as necessary to carry out the department's purpose and duties, the department immediately must be provided:

(1) by a provider of medical care, access to information and records regarding a child whose death is being reviewed by the department, including information on prenatal care;

- (2) access to all information and records maintained by any state, county, or local government agency, including, but not limited to, birth certificates, law enforcement investigation data, county coroner or medical examiner investigation data, parole and probation information and records, and information and records of social services and health agencies that provided services to the child or family, including information made strictly confidential in Section 63-7-940 concerning unfounded reports of abuse or neglect.

§ 63-7-1970. Subpoena power.

When necessary in the discharge of the duties of the department and upon application of the department, the clerks of court shall issue a subpoena or subpoena duces tecum to any state, county, or local agency, board, or commission or to any representative of any state, county, or local agency, board, or commission or to a provider of medical care to compel the attendance of witnesses and production of documents, books, papers, correspondence, memoranda, and other relevant records to the discharge of the department's duties. Failure to obey a subpoena or subpoena duces tecum issued pursuant to this section may be punished as contempt.

§ 63-11-1980. Confidentiality of meetings.

- (A) Meetings of the committee and department are closed to the public and are not subject to Chapter 4, Title 30, the Freedom of Information Act, when the committee and department are discussing individual cases of child deaths.
- (B) Except as provided in subsection (C), meetings of the committee are open to the public and subject to the Freedom of Information Act when the committee is not discussing individual cases of child deaths.
- (C) Information identifying a deceased child or a family member, guardian, or caretaker of a deceased child, or an alleged or suspected perpetrator of abuse or neglect upon a child may not be disclosed during a public meeting and information regarding the involvement of any agency with the deceased child or family may not be disclosed during a public meeting.
- (D) Violation of this section is a misdemeanor and, upon conviction, a person must be fined not more than five hundred dollars or imprisoned not more than six months, or both.

§ 63-11-1990. Confidentiality of information.

- (A) All information and records acquired by the committee and by the department in the exercise of their purposes and duties pursuant to this article are confidential, exempt from

disclosure under Chapter 4, Title 30, the Freedom of Information Act, and only may be disclosed as necessary to carry out the committee's and department's duties and purposes.

- (B) Statistical compilations of data which do not contain information that would permit the identification of a person to be ascertained are public records.
- (C) Reports of the committee and department which do not contain information that would permit the identification of a person to be ascertained are public information.
- (D) Except as necessary to carry out the committee's and department's purposes and duties, members of the committee and department and persons attending their meeting may not disclose what transpired at a meeting which is not public under Section 63-11-1970 and may not disclose information, the disclosure of which is prohibited by this section.
- (E) Members of the committee, persons attending a committee meeting, and persons who present information to the committee may not be required to disclose in any civil or criminal proceeding information presented in or opinions formed as a result of a meeting, except that information available from other sources is not immune from introduction into evidence through those sources solely because it was presented during proceedings of the committee or department or because it is maintained by the committee or department. Nothing in this subsection may be construed to prevent a person from testifying to information obtained independently of the committee or which is public information.
- (F) Information, documents, and records of the committee and department are not subject to subpoena, discovery, or the Freedom of Information Act, except that information, documents, and records otherwise available from other sources are not immune from subpoena, discovery, or the Freedom of Information Act through those sources solely because they were presented during proceedings of the committee or department or because they are maintained by the committee or department.
- (G) Violation of this section is a misdemeanor and, upon conviction, a person must be fined not more than five hundred dollars or imprisoned for not more than six months, or both.

Appendix Nine

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